No. 87-363-CFX
Status: GRANTED

Title: Federal Energy Regulatory Commission, Petitioner
v.
Martin Exploration Management Company, et al.

Docketed:
August 31, 1987

Court: United States Court of Appeals
for the Tenth Circuit

Vide:
87-364

Counsel for petitioner: Solicitor General, Moring,Frederick

Counsel for respondent: Herman,Stephen A., Wood,Harris S., Evans,David J., Benham,William T., Pate,Michael L., Rasch,Douglas W., Gooch,R. Gordon, Martin,William S., Shoneman,Charles H., Petricoff,M. Howard, Pain,Charles L., Hurst,Ronald D., Riedman Jr.,Kenneth L., Chapman,John B., Johnson,Thomas G., Coleman,Constance D., Holtzinger Jr.,John E., Davidson,Jeffrey S.

NOTE* Time to file ext by White, J. to & inc. 8.31.87

Entry	Date	Note	Proceedings and Orders
1	Jul 18 1987		Application for extension of time to file petition and order granting same until August 31, 1987 (White, July 22, 1987).
2	Aug 31 1987	G	Petition for writ of certiorari filed.
3	Sep 21 1987	G	Motion of Williams Natural Gas Company for leave to file a brief as amicus curiae in No. 87-363 filed.
7	Sep 21 1987	G	Motion of Interstate Natural Gas Association of America for leave to file a brief as amicus curiae in No. 87--363 filed.
5	Sep 22 1987		Order extending time to file response to petition until October 30, 1987.
6	Sep 22 1987		The above extension applies to all respondents.
11	Oct 30 1987	X	Brief of respondents Martin Exploration Management Co., et al. in opposition filed. VIDED.
8	Nov 4 1987		DISTRIBUTED. November 25, 1987
12	Nov 19 1987	X	Reply brief of petitioner Federal Energy Regulatory Commission filed.
13	Nov 19 1987		Lodging received.
14	Nov 30 1987		Motion of Williams Natural Gas Company for leave to file a brief as amicus curiae in No. 87-363 GRANTED.
15	Nov 30 1987		Motion of Interstate Natural Gas Association of America for leave to file a brief as amicus curiae in No. 87--363 GRANTED.
16	Nov 30 1987		Petition GRANTED. The case is consolidated with 87-364, and a total of one hour is allotted for oral argument. **
17	Dec 19 1987		Record filed.
		*	Certified original record and C. A. proceedings received.
18	Dec 22 1987	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
19	Jan 11 1988		Motion of the Solicitor General to dispense with

No. 87-363-CFX

Entry	Date	Note	Proceedings and Orders
			printing the joint appendix GRANTED.
20	Jan 14 1988		Brief of respondent CNG Transmission Corp. in support of petition filed. VIDED.
21	Jan 14 1988		Brief of petitioner Fed. Energy Reg. Commission filed. VIDED.
22	Jan 14 1988	G	Motion of Interstate Natural Gas Association of America for leave to file a brief as amicus curiae filed.
23	Jan 14 1988	G	Motion of Williams Natural Gas Company for leave to file a brief as amicus curiae filed.
26	Jan 26 1988	G	Motion of the Solicitor General for divided argument filed.
24	Feb 1 1988		Record filed.
		*	Original Administative Record (FERC) - 1 box.
25	Feb 5 1988		SET FOR ARGUMENT, Monday, March 28, 1988. (1st case). This case is consolidated with 87-364. 1 hour.
27	Feb 16 1988		Brief of respondents Martin Exploration Mgmt Co., et al. filed. VIDED.
28	Feb 22 1988		Motion of Interstate Natural Gas Association of America for leave to file a brief as amicus curiae GRANTED. Justice White OUT.
29	Feb 22 1988		Motion of Williams Natural Gas Company for leave to file a brief as amicus curiae GRANTED. Justice White OUT.
30	Feb 22 1988		Motion of the Solicitor General for divided argument GRANTED. Justice White OUT.
31	Feb 23 1988		CIRCULATED.
32	Mar 14 1988	X	Reply brief of petitioner Fed. Energy Reg. Commission filed. VIDED.
33	Mar 28 1988		ARGUED.

No.

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, as the Federal Energy Regulatory Commission determined, natural gas that is covered by two provisions of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*—one of which sets a ceiling on prices, the other of which declares prices deregulated—must be treated as deregulated gas under the NGPA; or whether, instead, producers may choose, perhaps daily, the classification that, under current market conditions and their contracts, affords them the highest price.

2. Whether the Commission's ruling that most "new tight formation gas" under Section 107(c)(5) of the NGPA is automatically new gas under Section 102 or 103 of the Act is consistent with the Commission's authority under the NGPA.

PARTIES TO THE PROCEEDINGS

The petitioner is the Federal Energy Regulatory Commission. The respondents are Martin Exploration Management Company; Colorado Energy Corporation; Phillips Petroleum Company; Phillips Oil Company; Exxon Corporation; Shell Off-Shore, Inc.; Shell Western E & P, Inc.; Independent Oil & Gas Association of West Virginia; Amoco Production Company; Arco Oil & Gas Company; Ohio Oil and Gas Association; Independent Oil and Gas Association of West Virginia; Gulf Oil Corporation, successor to Chevron, U.S.A., Inc.; Union Oil Company of California; Champlin Petroleum Company; Pennzoil Company; Pennzoil Oil & Gas, Inc.; Pennzoil Producing Company; Placid Oil Company; Tennessee Gas Pipeline Company, a division of Tenneco, Inc.; Pacific Gas & Electric Company; Amoco Production Company; Transok, Inc.; Oklahoma Natural Gas Company, a division of Oneok, Inc.; Associated Gas Distributors; Public Service Commission of the State of New York; Pacific Lighting Gas Supply Company; Southern California Gas Company; Consolidated Gas Transmission Corporation; Panhandle Eastern Pipe Line Company; Cities Service Oil and Gas Corporation; Grace Petroleum Corporation; Valero Transmission Company; BHP Petroleum Company, Inc., successor to Monsanto Oil Company; Texas Eastern Transmission Corporation; Transwestern Pipeline Company; United Gas Pipe Line Company; United Texas Transmission Company; and Texas Gas Transmission Corporation.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No.

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Federal Energy Regulatory Commission (Commission or FERC), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported, as modified, at 813 F.2d 1059. The order of the court of appeals modifying the original opinion (App., *infra*, 29a-31a) is not separately reported. The notice of proposed rulemaking of FERC (App., *infra*, 34a-60a) is reported at 49 Fed. Reg. 36399. The opinion accompanying issuance of the final rule by FERC (App., *infra*, 61a-103a) is reported at 49 Fed. Reg. 46874 and F.E.R.C. Stats. and Regs. para. 30,613. The FERC opinion denying rehearing in relevant part (App., *infra*, 104a-126a) is reported at 49 Fed. Reg. 50637 and F.E.R.C. Stats. and Regs. para. 30,622.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 32a-33a) was entered on March 9, 1987. Petitions for rehearing were denied, with modifications of the original

decision, on May 1, 1987 (App., *infra*, 29a-31a). On July 22, 1987, Justice White extended the time for filing a petition for a writ of certiorari to and including August 31, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 101(b)(5), 107(c)(5), 121, and 122 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3311(b)(5), 3317(c)(5), 3331, 3332, are set out in the appendix to this petition (App., *infra*, 127a-131a).

Section 270.208 of 18 C.F.R. provides:

> First sales of natural gas that is deregulated natural gas as defined in § 272.103(a) is price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

STATEMENT

The Commission construed the NGPA to require, in accordance with the Act's overall scheme of phased-in deregulation, that natural gas that is qualified for both price-deregulated and price-regulated status under the Act be treated as deregulated. The court of appeals rejected the Commission's construction (App., *infra*, 10a). The court held that producers of natural gas could choose whatever statutory category afforded them the highest price under their contracts and market conditions at any particular moment, even if the choice meant returning deregulated gas to regulated status (*id.* at 17a, 30a).

A. *Statutory Background*

1. Prior to 1978, producer (wellhead) natural gas sales, if made in interstate commerce, were governed by the Natural Gas Act, 15 U.S.C. 717 *et seq.* Following this

Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), the Federal Energy Regulatory Commission (and its predecessor, the Federal Power Commission) established just-and-reasonable ceiling rates for such sales. Those rates were generally lower than what producers could command selling gas in the unregulated, intrastate market. See *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 327-331 (1983). "By the 1970's, however, it became clear that the existing regulatory structure was inadequate" (App., *infra*, 3a). The combination of price ceilings applicable to interstate sales and no constraints on intrastate sales artificially reduced supply and inflated demand in the interstate market. *Ibid.*; Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 Harv. L. Rev. 941 (1973); Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101, 106-112 (1980).

In 1977, the House and Senate each passed bills designed to address the problem. The House, as part of a broader National Energy Act, passed a bill that would have extended regulatory controls by imposing uniform price regulation, at levels aimed at encouraging production, on all natural gas, interstate or intrastate (H.R. 8444, 95th Cong., 1st Sess. (1977)). The Senate took a radically different approach. It passed a bill (S. 2104, 95th Cong., 1st Sess. (1977)) that provided for deregulation of all natural-gas prices by 1982, with certain price controls in the interim. See *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 331-332; Note, *supra*, 59 Tex. L. Rev. at 113-115.

The conflict between the houses went to a Conference Committee, which proposed an entirely new bill roughly one year later (H.R. 5289, 95th Cong., 2d Sess. (1978); H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. (1978)). The conference bill struck a compromise between the

House's proposed increased regulation and the Senate's proposed rapid deregulation (see H.R. Conf. Rep. 95-1752, *supra*, at 67-68; 124 Cong. Rec. 38361 (1978) (remarks of Rep. Dingell); *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 331)). The bill brought interstate and intrastate gas under a single " 'national market price regulatory scheme' " (*Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd. (Transco)*, No. 84-1076 (Jan. 22, 1986), slip op. 11, quoting Haase, *The Federal Role in Implementing the Natural Gas Policy Act of 1978*, 16 Hous. L. Rev. 1067, 1079 (1979)); replaced Commission-set ceilings (at "just and reasonable" rates) with price ceilings generally set directly by statute, many designed to provide incentives for new production; and mandated "deregulation of most categories of natural gas" (H.R. Conf. Rep. 95-1752, *supra*, at 68) after a transition period of up to nine years. See Note, *supra*, 59 Tex. L. Rev. at 116. Enacted as the NGPA, the bill thus "comprehensively and dramatically changed the method of pricing natural gas produced in the United States" (*Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 322).

2. Title I of the NGPA creates the scheme of "phased deregulation" (124 Cong. Rec. 38361 (1978) (remarks of Rep. Dingell)) in two stages. Subtitle A (NGPA §§ 101-110, 15 U.S.C. 3311-3320) defines numerous categories of natural gas and establishes (or, in a few exceptional cases, permits the Commission to set) "maximum lawful price[s]" for wellhead "first sale[s]" of gas in each category.[1] Subtitle B (NGPA §§ 121-123 (15 U.S.C. 3331-3333)) then provides for the removal of certain of those ceilings after periods ranging from several months to nine years.

[1] A "first sale" is most often, but not exclusively, a sale by the producer of the natural gas (NGPA § 2(21), 15 U.S.C. 3301(21)).

More particularly, Subtitle A defines numerous categories of natural gas,[2] which, aside from a catch-all residual category (NGPA § 109 (15 U.S.C. 3319)), fall roughly into three groups. (1) Four provisions set prices (or authorize the Commission to do so) that are designed to furnish incentives for new production: Sections 102 and 103 (15 U.S.C. 3312, 3313) cover certain new natural gas[3]; Section 107 (15 U.S.C. 3317) covers certain "high-cost" natural gas[4]; Section 108 (15 U.S.C. 3318) covers gas from certain low-producing "stripper" wells.[5] (2) Two provisions (§§ 104 and 106(a), 15 U.S.C. 3314, 3316(a)) cover "old" interstate gas—gas dedicated to interstate commerce prior to NGPA's effective date or sold under "rollover" interstate contracts—and set non-incentive, consumer-protection price ceilings based on the Natural Gas Act. (3) Two provisions (§§ 105 and 106(b), 15 U.S.C. 3315, 3316(b)) cover "old" intrastate gas—defined analogously to "old" interstate gas—and set price ceilings tied to those for "new" Section 102 gas.

[2] The category-defining sections are Sections 102-109 (15 U.S.C. 3312-3319). Section 101 (15 U.S.C. 3311) defines the annual inflation adjustment factor and other "[r]ules of general application" relevant to the remainder of the Act. Section 110 (15 U.S.C. 3320) concerns the treatment of state severance taxes and certain production-related costs.

[3] Section 102 (15 U.S.C. 3312) covers gas from a new reservoir, from certain new Outer Continental Shelf leases, or from a new well drilled sufficiently far from certain existing "marker" wells. Section 103 (15 U.S.C. 3313) covers certain new onshore production wells.

[4] Section 107 (15 U.S.C. 3317) defines four categories of high-cost gas (Subsections (c)(1) through (4)) and allows the Commission to designate other gas that is especially costly or risky to produce (Subsection (c)(5)).

[5] A "stripper" well is one that produces 60 Mcf or less per day. See NGPA § 108(b), 15 U.S.C. 3318(b); NGPA § 2(29) (15 U.S.C. 3301(29)) (defining "Mcf").

Section 121 (15 U.S.C. 3331), the central provision of Subtitle B, mandates the elimination of price ceilings for certain of the categories of natural gas specified in Subtitle A.[6] Most important, on January 1, 1985, price ceilings were eliminated from certain of the incentive-priced gas qualifying under Sections 102 and 103 ("new" gas) and under Sections 105 and 106(b) ("old" intrastate gas) (15 U.S.C. 3312, 3313, 3315, 3316(b)).[7] See NGPA § 121(a), 15 U.S.C. 3331(a).[8] Some gas, however—notably, certain "high-cost" gas (Subsection 107(c)(5), 15 U.S.C. 3317(c)(5)) and "stripper well" gas (Section 108, 15 U.S.C. 3318)—remains subject to price ceilings. Section 122 (15 U.S.C. 3332) completes the deregulation scheme by giving the President and Congress an option for a one-time 18-month reimposition of price controls, an option that expired on June 30, 1987, without having been invoked.

3. The categories defined by the provisions of Subtitle A overlap: substantial quantities of natural gas can qualify

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[6] Specifically, Section 121(a) states: "Subject to the reimposition of price controls as provided in section 122, the provisions of subtitle A respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e), cease to apply effective January 1, 1985 * * *."

Subsection (d) is not relevant to this case. Subsection (e) limits the deregulation of one category (§ 105(b)(3), 15 U.S.C. 3315(b)(3)) of gas. See note 24, *infra*.

[7] Certain "old" intrastate gas covered by Section 105 continues to be subject to price ceilings. See NGPA § 121(e) (15 U.S.C. 3331(e)).

[8] In addition, pursuant to Section 121(b) (15 U.S.C. 3331(b)), on November 1, 1979, price ceilings were removed from some "high-cost" gas under Section 107(c)—namely, gas under Subsections (c)(1)-(4) (15 U.S.C. 3317(c)(1)-(4)). (Gas under Subsection (c)(5) (15 U.S.C. 3317(c)(5)) remains subject to price ceilings.) Also, on July 1, 1987, price ceilings were removed from "new" Section 103 gas produced from shallow wells never previously dedicated to interstate commerce. See NGPA § 121(c), 15 U.S.C. 3331(c).

simultaneously under more than one provision.[9] In addition to the overlap of several regulated categories, there is overlap between categories that remain subject to price ceilings (regulated gas) and categories that are free from any maximum lawful price (deregulated gas). For example, the categories defined by Sections 107(c)(5) and 108 (15 U.S.C. 3317(c)(5), 3318) (certain high-cost natural gas and stripper-well gas), which remain subject to price ceilings, overlap significantly with the new-gas categories defined by Sections 102 and 103 (15 U.S.C. 3312, 3313), which are now deregulated. See App., *infra*, 43a, 73a.

The NGPA contains a provision addressed to the general question of such "dual-qualified" gas. In Section 101(b) (15 U.S.C. 3311(b)), which sets forth "Rules of general application," Subsection (b)(5) states:

> (5) Sales qualifying under more than one provision.—If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.[10]

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[9] Pursuant to NGPA § 503, 15 U.S.C. 3413, producers obtain rulings on the proper classification or classifications of "new," high-cost and stripper-well gas from certain state or federal agencies, subject to Commission review. Dual qualification is permitted. See 124 Cong. Rec. 38364 (1978) (explanatory statement on conference bill by Reps. Dingell, Staggers, Ashley, Eckhardt, and Wilson).

[10] The Conference Report explains (H.R. Conf. Rep. 95-1752, *supra*, at 74):

> The conference agreement provides that if natural gas qualifies under more than one price category, the provisions that permit the seller to obtain the highest price applies [*sic*]. If a seller wishes to change the category under which production from a given well qualifies, he must apply to the appropriate State or Federal agency with authority to make determinations under section 503.

B. *The Commission's Rules*

As the principal deregulation date (January 1, 1985) approached, the Commission found it necessary to consider the proper treatment of gas that qualified for both regulated and deregulated treatment. At the time the NGPA was enacted in 1978, it appears to have been universally assumed that market prices would be higher than the statutory ceilings, so that producers would prefer deregulated treatment. By the end of 1984, this situation had been reversed. See App., *infra*, 22a-23a. Consequently, many producers preferred their dual-qualified regulated-deregulated gas to be treated as still subject to a regulated price.[11] See App., *infra*, 73a-78a.

In September 1984 the Commission proposed a regulation to determine the legal treatment of gas that is qualified for both deregulated and regulated treatment.[12] App., *infra*, 43a-45a. After receipt of comments, the Commission, in November 1984, issued a final rule establishing that, as of January 1, 1985, gas that is

[11] Many producers have contracts that fix the price of their gas far into the future, often providing alternative prices depending on the regulatory classification of the gas and leaving it up to government action (statute, regulation, order) to determine the classification of the gas. The price fixed for regulated gas is commonly at or near the maximum lawful price. By contrast, the price for gas treated as not subject to a price ceiling is typically based on market prices. As a result, when market prices are below the statutory ceilings, many producers wish to have their gas treated as falling within one of the still-regulated categories, so that they can collect a higher price.

[12] The Commission addressed only gas that actually is qualified in two categories by the relevant state or federal agency, (insofar as qualification is needed for sale in a category), not all gas that could conceivably be so qualified. See 18 C.F.R. 270.208, referring to 18 C.F.R. 272.103(a), which defines deregulated gas to include only gas actually qualified by the relevant agency (and certain "old" intrastate gas, which need not be so qualified).

Certain other issues were addressed in the rulemaking proceeding and in the court of appeals. We discuss only the dual-qualification questions.

qualified for a category not subject to any price ceiling would be treated as deregulated and could be sold at any price the market would bear, even if the gas also is qualified for one of the categories still subject to statutory price ceilings. App., *infra*, 73a-82a; see page 2, *supra* (quoting rule, 18 C.F.R. 270.208). Noting that market prices were then below statutory ceiling prices, that "Congress may not have anticipated such a situation" (App., *infra*, 75a), and that many producers would therefore prefer to remain subject to price regulation, the Commission construed the NGPA to mandate deregulation.[13]

The Commission based this conclusion, first, on Section 121 of the NGPA (15 U.S.C. 3331), which by its terms mandates the removal of Subtitle A's price ceilings for the specified categories of natural gas. The Commission read the provision to embody Congress's mandate to "phase from regulated ceiling prices in the short term to market clearing prices in the long term" (App., *infra*, 76a). See App., *infra*, 75a-77a. The Commission pointed out (App., *infra*, 74a; see also App., *infra*, 43a) that "the overall scheme envisioned by Congress when it enacted the NGPA [was] to provide incentive prices to encourage exploration and development of new reserves in the short-term, and to gradually substitute market forces for regulated prices by phasing in deregulation in 1985 and 1987."

The Commission likewise construed Section 101(b)(5) (15 U.S.C. 3311(b)(5)) to require deregulated treatment of gas that falls under both a provision setting a ceiling price and one eliminating any legal ceiling price (App., *infra*, 78a-79a).[14] The Commission concluded that Section

[13] The Commission also noted that, in 1979 and 1980, when market conditions were different, several producers, including some of respondents here, specifically argued in favor of the construction of the NGPA adopted by the Commission in the proceedings at issue in this petition. App., *infra*, 74a & n.10.

[14] The Commission stated that the provision was "helpful, but not dispositive" of the issue (App., *infra*, 78a).

101(b)(5), in declaring applicable whichever of the competing provisions "could result in the highest price," means that "the deregulated price, which always *could* result in a price *higher* than a regulated price, prevails" because "there always exists at least the potential for the parties to negotiate a contract above the old regulated ceiling price" (App., *infra*, 79a (emphasis in original)). The Commission further explained on rehearing (App., *infra*, 111a (footnote omitted; emphasis in original)): "Without question, a deregulated price *could* always result in a price higher than a regulated price which is subject to a ceiling price; whether the *contract* allows the producer to collect a price higher than a regulated price is a contractual issue, not an issue raised by the deregulation scheme of the NGPA."[15]

C. *The Court of Appeals Decision*

On petitions for review filed by numerous producers under Section 506 of the NGPA (15 U.S.C. 3416), the court of appeals rejected the Commission's interpretation of Sections 101(b)(5) and 121 (15 U.S.C. 3311(b)(5), 3331) of the NGPA. App., *infra*, 1a-24a. The court first concluded that Section 121 is ambiguous, because, although it commands the elimination of price ceilings for the listed categories of natural gas, it does not explicitly address the subject of deregulated gas that simultaneously qualifies for a regulated category (App., *infra*, 10a-11a). The court then stated that, despite the ambiguity, it could not defer to the Commission's interpretation, because "Congress

[15]In the course of explaining its rule for the treatment of dual-qualified regulated-deregulated gas, the Commission also ruled (App., *infra*, 81a-82a; see also App., *infra*, 114a-116a) that any qualification of gas as "new tight formation" gas under Section 107(c)(5) and the implementing regulations (*e.g.*, 18 C.F.R. 271.703(b)) automatically qualifies the gas (except for certain "recompletion tight formation gas," App., *infra*, 82a n.18)) as new gas under Section 102 or 103, hence placing it under deregulation.

anticipated precisely this question in § 101(b)(5)" (App., *infra*, 11a) and the Commission's ruling was contrary to the "unambiguous language" of that provision (App., *infra*, 13a).

After concluding that Section 101(b)(5) applies to all dual-qualified gas, even if one of the overlapping categories is deregulated,[16] the court held that the "could result" language of Section 101(b)(5) expressly and unambiguously gives producers the right to choose, at any particular moment, whatever category, regulated or deregulated, provides the highest price under their contracts. App., *infra*, 16a-17a; *id*. at 30a (modification on petitions for rehearing). While recognizing that "the price of deregulated natural gas in an open market 'could' theoretically reach infinity" (App., *infra*, 15a), the court reasoned that at least certain price ceilings for regulated gas "could" also rise indefinitely.[17] The court stated that the Commission's reading of Section 101(b)(5) "considers only the theoretical possibilities [and] renders § 101(b)(5)

[16] The court reasoned that Section 101(b)(5), in using the word "exemption" when referring to provisions "providing for any maximum lawful price or for any exemption from such a price," applies to statutory provisions declaring gas prices deregulated. The court rejected the suggestion that the term "exemption" applies only to the provisions (§§ 104(b)(2), 106(c), 109(b)(2), 15 U.S.C. 3314(b)(2), 3316(c), 3319(b)(2)) that grant the Commission authority to set special "just and reasonable" ceilings higher than statutory ceilings for particular categories. The court pointed out that another of the "Rules of general application"—namely, Section 101(b)(9) (15 U.S.C. 3311(b)(9))—uses "exempted" and "exemption" to refer to provisions that deregulate gas prices (App., *infra*, 14a-15a).

[17] The court noted that the Commission could set price ceilings at "just and reasonable" rates under certain regulated-price provisions (§§ 104(b)(2), 106(c), 109(b)(2), 15 U.S.C. 3314(b)(2), 3316(c), 3319(b)(2)) and that the Subtitle A ceiling prices generally rise with inflation. "The price of regulated gas is therefore certain to rise, and is capable of reaching an indefinite 'just and reasonable' rate." App., *infra*, 15a-16a.

meaningless" (App., *infra*, 16a). The court concluded that Section 101(b)(5) "requires a comparison of the applicable price for each category at a particular moment" based on producers' actual contracts (App., *infra*, 16a), with the higher price governing (*id.* at 16a-17a).

In support of that conclusion, the court indicated that it read the NGPA, informed by several congressional floor statements, as granting a producer the right to "select the category or categories for which he or she desires to qualify particular gas" (App., *infra*, 19a). See App., *infra*, 18a-19a (citing 124 Cong. Rec. 29109 (1978) (remarks of Sen. Jackson); *id.* at 38363-38364 (remarks of Rep. Dingell)).[18] The court also criticized the Commission's reliance on phased deregulation as the overall plan of the NGPA. Phased deregulation is only one means of achieving the ultimate statutory aim of ensuring adequate supplies at fair prices, the court stated (App., *infra,* 20a). Briefly mentioning a few statements from the NGPA's legislative history (App., *infra*, 21a-22a n.15), the court noted that the cited passages had "somewhat contradictory" implications (*id.* at 21a n.15). Indeed, the court recognized that "Congress did not expect that natural gas prices would fall" and hence did not anticipate the situation presented to the Commission in 1984 and today—that of producers wishing to remain under regulation (*id.* at

[18] The court expressed this view in rejecting the Commission's ruling that most Section 107(c)(5) "new tight formation" gas (15 U.S.C. 3317(c)(5)) is automatically also gas under Section 102 or 103 (15 U.S.C. 3312, 3313), a ruling that both the Commission and the court treated as part of the broader dual-qualification ruling (App., *infra,* 18a-19a; see note 15, *supra*). The court agreed that, with the "recompletion" exception acknowledged by the Commission (see note 15, *supra*), new tight formation gas in fact always meets the definitions under Section 102 or 103. But the court held that Congress had given producers the right to choose what categories to apply for, so that they could avoid qualification as deregulated gas if they wished.

22a-23a). The court of appeals also recognized that, under its view, Section 101(b)(5) "can have the unanticipated effect of operating as a price floor for producers" (App., *infra*, 23a). Nevertheless, the court felt itself bound by "the intent of Congress as evidenced in the unambiguous language of [the NGPA]" (App., *infra*, 24a).

REASONS FOR GRANTING THE PETITION

The Tenth Circuit decision is clearly incorrect. The Commission properly concluded, in construing a statute it is charged with administering, that Section 101(b)(5) of the NGPA requires price deregulation for gas that is qualified for both a regulated and a deregulated category.[19] The decision of the court of appeals, if permitted to stand, would impose enormous additional costs on purchasers of natural gas.

1. To begin with the statutory language, the most natural reading of Section 101(b)(5) is that, if natural gas is subject to two or more provisions of the NGPA, the "provision which could result in the highest price" is the provision that, solely with reference to limits imposed under the NGPA, permits the highest price. See also H.R. Conf. Rep. 95-1752, *supra*, at 74 (emphasis added) ("the provisions that *permit* the seller to obtain the highest price"). Section 101(b)(5) thus calls for a comparison of existing legal limits on the prices producers may charge (in most cases set directly by the NGPA, in some cases set by

[19] We do not renew the argument we made in the court of appeals that Section 101(b)(5) does not apply to dual-qualified regulated-deregulated gas.

In addition to the court of appeals' dual-qualification holding, we also challenge the court's holding concerning the treatment of Section 107(c)(5) gas. The court did not treat that issue as a distinct one. We present the question separately (page I, *supra*), but it is closely related to the main question and warrants only brief discussion. See note 23, *infra*.

the Commission pursuant to statutorily delegated authority). Where one provision sets a maximum lawful price and another declares that there is no such ceiling, the latter provision governs because it leaves the producers free to charge the higher price—namely, any price, as far as the NGPA is concerned.

Contrary to the court of appeals' view, the statutory language contains no hint that it calls for comparison of producers' contracts. Section 101(b)(5) refers only to comparing "provision[s]," not to comparing contracts. Moreover, the use of the statutory phrase "could result" is inconsistent with a focus on actual contract prices. To achieve the court of appeals' result, it would have been more natural for Congress to have declared applicable the provision that "results" or that "would result" in the highest price. Congress instead used the word "could," referring to the range of legally permitted possibilities.

The court of appeals appears to have misunderstood the Commission's construction, and was plainly mistaken in concluding that the Commission's view rendered Section 101(b)(5) meaningless (App., *infra,* 15a-16a). A provision that eliminates price ceilings always permits the seller to obtain, *i.e.,* always "could result" in, a higher price than a provision that, directly or through statutorily delegated Commission action, sets an upper cap on producers' prices. The Commission's interpretation leaves no doubt about which provision governs under Section 101(b)(5). The court of appeals' reference to the Commission's power to set certain "just and reasonable" rates and to the raising of ceiling prices by inflation adjustments over time (see note 17, *supra*) was simply irrelevant. Section 101(b)(5) is not concerned with "theoretical" possibilities at a particular moment or over an indefinite period. It is concerned only with what the law permits, not with what market conditions or imagination permit. A provision that removes upper caps permits a higher price than one that

sets an upper cap (even if that cap is adjustable), and the former provision therefore governs under Section 101(b)(5).

2. The court of appeals' focus on producers' actual contract prices (and their fluctuation) is inconsistent not only with the language of Section 101(b)(5) but with the approach to price regulation taken by Title I of the NGPA as a whole. As reflected in the Commission's view, the NGPA regulates only legal upper limits, not producers' actual prices. Thus, the price-regulation provisions of Subtitle A do not establish the prices that producers must charge; rather, they are concerned solely with setting "maximum lawful price[s]" or "ceiling prices." Section 504(a) (15 U.S.C. 3414(a)) enforces the ceilings by declaring it unlawful "to sell natural gas at a first sale price in excess of any applicable maximum lawful price." Moreover, to underscore the exclusive concern with upper limits, Section 101(b)(9) (15 U.S.C. 3311(b)(9)) expressly declares that contract prices are enforceable as long as they are lower than any applicable statutory ceiling, and are always lawful if a price-deregulation provision applies. Congress clearly sought to set only maximum prices and otherwise to leave the establishment of the prices producers would actually charge to private decision.

The court of appeals read Section 101(b)(5) to require comparison of producers' actual contract prices, rather than of upper caps on the range of legally permitted prices. That reading would erroneously treat Section 101(b)(5) as specifying the actual prices producers must charge—namely, the highest of the applicable contract prices. It would do so, moreover, even when the two overlapping categories at issue both set ceiling prices (*i.e.,* in the case of dual-qualified regulated-regulated gas), requiring comparison not of the ceilings but of the actual contract prices. Nothing in the statute or in the court of appeals' opinion supports such a result. Indeed, it is

squarely contrary to the fact that Section 101(b)(5) does not establish the governing price but only declares what "provision" governs, and that the provisions of Title I, in turn, establish only ranges of legally permitted prices. See also 124 Cong. Rec. 38363 (1978) (emphasis added) (Section 101(b)(5) "is intended to facilitate resolution of which *ceiling price* may apply if more than one ceiling price rule appears applicable. Whichever *ceiling price* could result in the highest price is the applicable *maximum lawful price*.") In short, the court of appeals' reading of Section 101(b)(5) would render the provision a glaring anomaly in a statute otherwise pervasively concerned only with ceiling prices.

3. The court of appeals' ruling is also inconsistent with the fundamental policy underlying the NGPA. The clear overall scheme of the NGPA is one of "phased deregulation" (124 Cong. Rec. 38361 (1978) (remarks of Rep. Dingell); see also *id.* at 29659 (remarks of Sen. Percy) ("the phased deregulation schedule * * * really is at the heart of this bill"). The Conference Report describes Title I of the NGPA as providing for the eventual "deregulation of most categories of natural gas" (H.R. Conf. Rep. 95-1752, *supra,* at 68). That policy reflected Congress's belief, as this Court recognized in *Transco,* slip op. 14 (footnote omitted), that "direct federal price control exacerbated supply and demand problems by preventing the market from making long-term adjustments." Congress decided to phase in deregulation over a nine-year period as a compromise between "two strong, but divergent, responses to the natural gas shortage" (*Public Service Comm'n* v. *Mid-Louisiana Gas Co.,* 463 U.S. at 331), one seeking to extend price controls (the House bill), the other seeking full decontrol as quickly as possible (by 1982, under the Senate bill). See Lovett, *Incentive and Conservation Effects: Natural Gas Policy Act of 1978,* 16 Hous. L. Rev. 1129, 1145 (1979).[20] To the extent that Congress deregulated "particular aspects of the first sale of gas, it did so because [after the specified phase-in periods] it wanted to leave determination of supply and first-sale price to the market" (*Transco,* slip op. 12).

Contrary to the court of appeals' view, it was proper for the Commission to support its ruling by observing that treating dual-qualified regulated-deregulated gas as deregulated is in keeping with Congress' overall phased-deregulation objective of the NGPA. The court of appeals' interpretation of Section 101(b)(5), by contrast, is incompatible with the congressional scheme. The court's decision establishes a uniform and permanent producer-assistance policy. But while the temporary incentive-price provisions of the NGPA were indeed intended to spur production, the deregulation policy that has now been phased in for most categories of gas is not intended to favor producers or production. Rather, deregulation is designed to let market forces determine prices and supply (see *Transco,* slip op. 12), and lower prices and lower production are one possible natural consequence of such a system.

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[20] The Conference Committee obviously adopted elements of both bills, bringing intrastate gas under control while "lengthening the period of time prior to the deregulation of most categories of natural gas" (H.R. Conf. Rep. 95-1752, *supra,* at 68). Representative Dingell, who was the floor manager of the Conference bill in the House, explained that, although he had opposed immediate deregulation for fear of its harsh consequences to consumers and potential for windfall profits, "[p]hased deregulation as set forth in the conference report avoids both of these objectionable results" (124 Cong. Rec. 38361 (1978)). On the compromise nature of the bill, see Allison, *Natural Gas Pricing: The Eternal Debate,* 37 Baylor L. Rev. 1, 37 (1985); Pierce, *Natural Gas Regulation, Deregulation and Contracts,* 68 Va. L. Rev. 63, 89 (1982); Moody & Garten, *The Natural Gas Policy Act of 1978: Analysis and Overview,* 25 Rocky Mtn. Min. L. Inst. 2-1, 2-39, 2-40 (1979); Lovett, *supra,* 16 Hous. L. Rev. at 1152.

The court of appeals' reading of Section 101(b)(5) is incompatible with the scheme of phased deregulation in another way as well. The court's reading would permit a producer to switch back and forth between deregulated and regulated status, with no apparent limitation, as market prices rose or fell. The potential for return of deregulated gas to regulated status is a continuing one, because deregulated "new" gas (under Sections 102 and 103 (15 U.S.C. 3312, 3313)) will always become regulated "stripper well" gas (under Section 108 (15 U.S.C. 3318)) as the well diminishes in production. There is certainly no indication that the NGPA contemplates such a peculiar result. Indeed, the congressional aim to make a transition to a market system for most natural gas strongly suggests the contrary. The intended transition is reflected in Section 122 (15 U.S.C. 3332), which establishes only one method to call off deregulation (action by the President or Congress), and then only temporarily and only once.

4. The court of appeals also erred in finding that its ruling was supported by a congressional commitment to the principle of producer choice. The language of Section 101(b)(5) itself refutes the suggestion that the statute embodies such a principle for dual-qualified gas. The provision declares what price provisions govern; it does not give producers any choice in the matter. The court of appeals' reference to producers' right to choose which among several available qualifications to apply for, whatever its correctness, is simply irrelevant. The Commission's rule here at issue applies, among gas that is required to be administratively qualified, only to gas that has in fact been dually qualified in both regulated and deregulated categories. See note 12, *supra*. Whether producers have an indefeasible right to select one or more applicable categories in qualifying their gas under Section 503 (15 U.S.C. 3413)[21] is entirely distinct from the question

[21] In our view, nothing in Section 503, which provides for administrative determinations of the proper category of natural gas, grants producers the indefeasible right to select one of two applicable

presented in this proceeding—which of several already-selected categories applies after deregulation. The former question is also of little remaining practical importance, in comparison with the question presented here.[22]

The two congressional floor statements cited by the court of appeals (App., *infra*, 18a-19a), even aside from questions about their power to modify the statute's command, do not establish a relevant statutory principle of producer choice. First, they are addressed not to the question at issue here but to the distinct question of producers' ability to select what qualifications to seek. Second, both statements, responding to concerns about the potential administrative burdens on the agencies that determine the classification of natural gas, merely affirm that the agencies have no statutory obligation to search through all possible classifications, demand all potentially relevant information from producers, and independently determine

categories. Indeed, the authority of the Commission to promulgate regulations under Sections 501(a) and (b) and 503(b) (15 U.S.C. 3411(a) and (b), 3413(b)) may well encompass the authority to implement the NGPA by directing that gas that in fact falls into a deregulated as well as regulated category be treated as deregulated. Such an action, moreover, would seem consistent with the concerns underlying the congressional floor statements quoted by the court of appeals, as discussed in text *infra*.

[22] If this Court reverses the Tenth Circuit's decision overturning the Commission's ruling that qualification under Section 107(c)(5) (15 U.S.C. 3317(c)(5)) automatically entails qualification under Section 102 or 103 (15 U.S.C. 3312, 3313), it should be a rare case where gas that is qualified for regulated status has not also been qualified for a deregulated status for which it is eligible. Aside from Section 107(c)(5) gas, most of which the Commission's rule would automatically qualify for deregulated status, the only regulated gas that presents a significant potential problem of overlap with deregulated gas is stripper-well gas qualified under Section 108, 15 U.S.C. 3318. Almost all such gas that could qualify under Section 102 or 103, however, will already have been so qualified before the well's production diminished and the gas became eligible for Section 108 status.

the proper category (see App., *infra,* 19a (quoting statements)). Neither statement suggests that the classification task itself may not be simplified, in comformity with the NGPA, by requiring permanent deregulated treatment of gas that falls into both a regulated and a deregulated category.[23]

In any event, as even the court of appeals recognized (App., *infra,* 21a-22a n.15), specific statements in the legislative history on dual-qualified gas must be given little weight. Not only are the implications contradictory, but all statements were made on the factual assumption, which has turned out to be false for the past several years, that market prices would be higher than the price ceilings set in the statute. The 1978 Congress, because of that assumption, simply had no occasion to consider the possibility

[23] The court of appeals was faced with one narrow aspect of the issue of producer choice of qualification. The court overturned the Commission's ruling that "new tight formation" gas under Section 107(c)(5) (15 U.S.C. 3317(c)(5)), with a specified exception, is automatically qualified under Section 102 or 103 (15 U.S.C. 3312, 3313) and hence deregulated. The court of appeals reached that decision in passing in the course of explaining its broader dual-qualification holding. This separate holding would have a significant impact on gas pricing and should be reversed.

In addition to the Commission's general regulatory authority, which we think would support restrictions on producer category choice even in other contexts (see note 21, *supra*), there is clear authority for the Commission's ruling with respect to Section 107(c)(5) gas. As the court of appeals appears to have recognized on petitions for rehearing (App., *infra,* 30a), the Commission is expressly authorized to establish the criteria for qualification as Section 107(c)(5) gas. The court of appeals did not disagree with the Commission's decision to base Section 107(c)(5) qualification on the same facts as are required to qualify for Section 102 or 103 status. It merely rejected the automatic dual qualification. The Commission's authority, however, surely encompasses this effort to simplify the qualification and regulatory process by ruling that Section 107(c)(5) natural gas that demonstrably meets all of the Section 102 or 103 criteria, based solely on the application for Section 107(c)(5) status, must be automatically so qualified.

that the deregulated price might not in fact be the price chosen by producers. There is, accordingly, no relevant evidence that Congress intended a principle of producer choice to override the command to deregulate.[24]

5. For all of the above reasons, the court of appeals' decision is erroneous: it creates a bizarre system of natural gas regulation (permitting repeated transfers of natural gas in and out of regulation) that is contrary to the language, structure, and overall aims of the NGPA. That conclusion is warranted independent of any deference to the Commission. But even if the statutory meaning is less than crystal clear, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation by the * * * agency" entrusted with administration of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (footnote omitted). See also *Clarke* v. *Securities Indus. Ass'n*, No. 85-971 (Jan. 14, 1987), slip op. 14-15; *Japan Whaling Ass'n* v. *American Cetacean Soc'y,* No. 85-954

[24] The court of appeals also cited (App., *infra,* 22a n.15) a statement in the Conference Report that "natural gas qualifying as gas produced from a natural gas stripper well [could be] sold subject to the provisions of sec. 108, rather than taking deregulated treatment as an existing intrastate contract" (H.R. Conf. Rep. 95-1752, *supra,* at 83). That statement, however, is not an explanation of Section 101(b)(5), but of a peculiar limitation on deregulation set by Section 121(e) (15 U.S.C. 3331(e)) for certain gas sold under intrastate contracts (NGPA § 105, 15 U.S.C. 3315). Moreover, the statement is in fact addressed to an overlap of two regulated categories (§ 108, 15 U.S.C. 3318, and § 105(b)(3), 15 U.S.C. 3315(b)(3)), not to the overlap of a regulated and a deregulated category. Indeed, the provision that the Conference Report statement explains, Section 121(e), supports the Commission's ruling here. In that provision, as in Section 101(b)(5), Congress addressed itself to dual-category gas; and Congress specifically provided that whenever the regulated category (§ 105(b)(3)) overlapped with a deregulated category (§§ 102, 103, 107(c)(1)-(4), 15 U.S.C. 3312, 3313, 3317(c)(1)-(4)), the deregulated category would be applicable.

(June 30, 1986), slip op. 11; *Young* v. *Community Nutrition Inst.*, No. 85-664 (June 17, 1986), slip op. 5-7. The Commission's interpretation is unquestionably reasonable[25] and should have been upheld by the court of appeals. *Mid-Louisiana Gas Co.*, 463 U.S. at 339.

6. The decision of the court of appeals should be reversed. This Court should not await development of a conflict among the circuits. So many gas producers were party to this challenge to the regulation that, for that reason alone, a conflict is unlikely to develop, at least in the near term. Meanwhile, the problem is of considerable practical importance. The Commission estimates that the 1985-1987 cost of the court of appeals' decision in higher natural-gas prices is approximately $300 million, and the costs continue to mount.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1987

[25] Indeed, as the Commission noted (see note 13, *supra*), several producers, including some of respondents here, argued in 1979 and 1980 that dual-qualified regulated-deregulated gas should be treated as deregulated irrespective of which price is higher.

* The Solicitor General is disqualified in this case.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 84-2756; 84-2759; 84-2760; 85-1172; 85-1250; 85-1254; 85-1257; 85-1443; and 85-1452.

MARTIN EXPLORATION MANAGEMENT COMPANY; COLORADO ENERGY CORPORATION; PHILLIPS PETROLEUM COMPANY; PHILLIPS OIL COMPANY; EXXON CORPORATION; SHELL OFF-SHORE, INC.; SHELL WESTERN E & P, INC.; INDEPENDENT OIL & GAS ASSOCIATION OF WEST VIRGINIA, AND AMOCO PRODUCTION COMPANY, PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT,

AND

ARCO OIL & GAS COMPANY; OHIO OIL AND GAS ASSOCIATION; INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA; GULF OIL CORPORATION, SUCCESSOR TO CHEVRON, U.S.A., INC.; UNION OIL COMPANY OF CALIFORNIA; CHAMPLIN PETROLEUM COMPANY; PENNZOIL COMPANY, PENNZOIL OIL & GAS, INC., PENNZOIL PRODUCING COMPANY; PLACID OIL COMPANY; TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO, INC.; PACIFIC GAS & ELECTRIC COMPANY; AMOCO PRODUCTION COMPANY; TRANSOK, INC.; OKLAHOMA NATURAL GAS COMPANY, A DIVISION OF ONEOK, INC.; ASSOCIATED GAS DISTRIBUTORS; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; PACIFIC LIGHTING GAS SUPPLY COMPANY; SOUTHERN CALIFORNIA GAS COMPANY; CONSOLIDATED GAS TRANSMISSION CORPORATION; PANHANDLE EASTERN PIPE LINE COMPANY; CITIES SERVICE OIL AND GAS CORPORATION; GRACE PETROLEUM CORPORATION; VALERO TRANSMISSION COMPANY; BHP PETROLEUM COMPANY,

INC., SUCCESSOR TO MONSANTO OIL COMPANY; TEXAS EASTERN TRANSMISSION CORPORATION; TRANSWESTERN PIPELINE COMPANY; UNITED GAS PIPE LINE COMPANY; UNITED TEXAS TRANSMISSION COMPANY; AND TEXAS GAS TRANSMISSION CORPORATION, INTERVENORS.

PETITIONS FOR REVIEW OF AN ORDER OF THE FEDERAL ENERGY REGULATORY COMMISSION

Decided March 9, 1987

Before BARRETT and TACHA, Circuit Judges, and BROWN*, District Judge.

TACHA, Circuit Judge.

This appeal presents challenges by natural gas producers to the Federal Energy Regulatory Commission (FERC) orders interpreting the statutory mandate in § 121 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3331, to deregulate certain natural gas prices. For the reasons set forth in this opinion, we affirm the FERC orders in part and reverse in part.

I.

The NGPA "comprehensively and dramatically changed the method of pricing natural gas produced in the United States." *Public Serv. Comm'n., New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 320 (1983). The purposes of these changes "are rooted in the history of federal

*The Honorable Wesley E. Brown, District Judge of the District of Kansas, sitting by designation.

natural gas regulation before 1978." *Id.* at 327. We therefore begin by examining the history of federal regulation of natural gas prices and the context in which the Ninety-Fifth Congress adopted the NGPA in 1978.

The first federal regulation of interstate sales of natural gas occurred with the passage of the Natural Gas Act of 1938 (NGA), Pub. L. No. 75-688, 52 Stat. 821 (codified as amended at 15 U.S.C. §§ 717-717w (1976)). "The NGA was enacted in response to reports suggesting that the monopoly power of interstate pipelines was harming consumer welfare." *Mid-Louisiana Gas Co.*, 463 U.S. at 327 (footnote omitted). State efforts to combat this problem had failed because they were found to be unconstitutional restrictions on interstate commerce. *E.g., Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924). The NGA authorized the Federal Power Commission (FPC)[1] to establish such price ceilings for the sale of interstate gas for resale as were "just and reasonable." 15 U.S.C. § 717c(a). The NGA did not regulate the price of gas sold in intrastate markets.

The FPC struggled to apply this scheme during the next several decades. By the 1970's, however, it became clear that the existing regulatory structure was inadequate. The federally regulated prices for interstate gas sales remained consistently below the unregulated prices for intrastate gas sales. Natural gas producers found it more profitable to commit more of their supplies to the intrastate market. At the same time, consumer demand for gas in the interstate market was artificially high because of the federally imposed ceiling prices. The result was a serious natural gas shortage in the interstate market. *See generally* Breyer and MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 Harv. L. Rev. 941 (1973).

[1] The FPC was succeeded by FERC pursuant to the Department of Energy Organization Act of 1977, 42 U.S.C. § 7101, 7134.

"The NGA and its regulatory history led to a single, overwhelming conclusion: under NGA regulations the domestic supply of natural gas could no longer meet consumer demands in the interstate market." Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101, 112 (1980) [hereinafter Note].

Congress repeatedly attempted to remedy this situation during the energy crisis of the 1970's. After several efforts to restructure the federal regulation of natural gas prices had failed, President Carter addressed the problem in his proposed Natural [*sic*] Energy Act in 1977. The President proposed an extension of price controls to the intrastate sale of natural gas and the establishment of a uniform and incentive-based pricing system for new natural gas. The House passed this proposal substantially unaltered. The Senate, however, was badly divided on the issue. Supporters of the House bill were opposed by supporters of the complete deregulation of natural gas prices. Proponents of deregulation believed that market forces would produce an equilibrium between supply and demand if the price of natural gas was not restricted. After a "pitched legislative battle," Note at 114, that included several filibusters, the Senate passed a bill that "would have maintained Natural Gas Act regulation for all gas sold or delivered in interstate commerce before January 1, 1977, and steadily cut back on Commission jurisdiction so that all natural gas sold after January 1, 1982, would have been completely deregulated." *Mid-Louisiana Gas Co.*, 463 U.S. at 331-32.

The Conference committee approved a compromise measure after months of deliberation. *See* H.R. Conf. Rep. No. 95-1752, 95th Cong., 2d Sess. [hereinafter Conf. Rep.], *reprinted in* 1978 U.S. Code Cong. & Admin. News 8983-9041. The committee bill did not adopt either the uniform regulation or the complete deregulation approach in their entirety; rather, the bill was the "careful reconciliation of two strong, but divergent, responses to the natural gas shortage." *Mid-Louisiana Gas. Co.*, 463 U.S. at 331. The conference bill was approved by both houses of Congress and signed into law by President Carter on November 9, 1978.

II.

The NGPA adopted new means to achieve the traditional purposes of the federal regulation of natural gas prices. "The aim of federal regulation remains to assure adequate supplies of natural gas at fair prices, but the NGPA reflects a congressional belief that a new system of natural gas pricing was needed to balance supply and demand." *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 106 S. Ct. 709, 716 (1986). The resulting pricing system is an intricate balance of uniform price ceilings, incentive prices, and partial phased deregulation.

The statutory scheme established by the NGPA divides natural gas production into numerous categories that are distinguished by the date that production began from a well or the particular type of drilling involved. Gas in these categories can be broadly classified as "old" gas, "new" gas, or difficult to produce gas. "Old" gas is generally that produced from wells that had been operating before the passage of the NGPA. *See* NGPA § 104, 15 U.S.C. § 3314 (sales of natural gas dedicated to interstate commerce at the time of the passage of the NGPA); NGPA § 105, 15 U.S.C. § 3315 (sales of gas under intrastate contracts existing at the time of the passage of the NGPA); NGPA § 106, 15 U.S.C. § 3316 (sale of gas under rollover contracts). "New" gas is generally that produced from wells that began production after the passage of the NGPA. *See* NGPA § 102, 15 U.S.C. § 3312 (sale of gas from new Outer Continental Shelf leases, new onshore wells, or new onshore reservoirs); NGPA § 103, 15 U.S.C. § 3313 (sale

of gas from new onshore production wells). Several methods of production are specifically described in the statute as difficult to produce gas. *See* NGPA § 107, 15 U.S.C. § 3317 (sale of gas produced through particular high-cost methods);[2] NGPA § 108, 15 U.S.C. § 3318 (sale of stripper well natural gas).[3] The categories are not mutually exclusive: a particular sale may be "dually qualified" within a "new" or "old" gas category and also a difficult to produce category.

The NGPA established ceiling prices for each of these categories of natural gas production. In general, the lowest ceiling prices were for old gas, higher ceiling prices were established for new gas, and the highest ceiling prices were for difficult to produce gas. The purpose of creating different ceilings was to create an incentive to drill for new gas, particularly gas that is costly to produce. Conf. Rep. at 87. Such an incentive was unnecessary for gas that was already being produced at the time the NGPA was enacted. The ceiling prices were set by the statute and designed to increase periodically pursuant to statutory formulas. *See, e.g.*, 15 U.S.C. § 3312(b) (the ceiling price for

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[2] High-cost natural gas includes gas "produced under such other conditions as the Commission determines to present extraordinary risks or costs." 15 U.S.C. § 3317(c)(5). FERC has specified tight formation gas as being high-cost natural gas within the meaning of § 107(c)(5). 18 C.F.R. § 271.703 (1986). "A 'tight formation' is a sedimentary layer of rock cemented together in a manner that greatly hinders the flow of any gas through the rock. . . . To stimulate production from these formations, producers must use expensive enhanced recovery techniques." Regulations Covering High-Cost Natural Gas Produced from Tight Formations, 45 Fed. Reg. 56,034-35 (1980) (footnote omitted).

[3] A stripper well is a "well which producers such small volume of [gas] that the gross income therefrom provides only a small margin of profit or, in many cases, does not even cover actual cost of production." H. Williams & C. Meyers, *Manual of Oil and Gas Terms* 572 (4th ed. 1976).

new gas was $1.75 per million Btu's in April 1977 and was to increase at a set rate above the annual inflation factor).

The price that a producer can receive for the sale of natural gas is limited by these ceiling prices. The relevant category for a particular sale of natural gas is determined by a procedure set out in the statute. NGPA § 503, 15 U.S.C. § 3413. In essence, a producer must apply for a determination that gas comes within a particular category or categories. This determination is usually to be made by an authorized state agency subject to FERC and judicial review. *Id.* The ceiling price can then be determined once the producer has selected and received approval for the applicable category or categories. The ceiling price, however, is not necessarily the price that is charged. The NGPA explicitly provides that the contract price agreed to by the parties is binding as long as it is below the ceiling prices. NGPA § 101(b)(9), 15 U.S.C. § 3311(b)(9).

The ceiling prices established by the NGPA represent the result of the congressional compromise favorable to the advocates of uniform pricing. The deregulation proponents achieved a phased elimination of many, but not all, of those price ceilings. Section 121 eliminates the price ceilings for many categories of natural gas. Certain high-cost natural gas as defined in § 107(c)(1)-(4) was deregulated in 1979. 15 U.S.C. § 3331(b). New natural gas as defined in § 102, new onshore production wells as defined in § 103(c), and some intrastate gas were deregulated on January 1, 1985. 15 U.S.C. § 3331(a). Most natural gas produced from 5,000 feet or less is to be deregulated on July 1, 1987. 15 U.S.C. § 3331(c). *But see* 15 U.S.C. § 3331(d) (certain Alaska natural gas is excluded from deregulation). The NGPA does not speak of the elimination of the ceiling prices for any other categories of gas. In particular, old gas is not deregulated, but it was expected that old gas would account for a decreasing proportion of the sale of natural gas with the

passage of time. Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 Va. L. Rev. 63, 89 (1982). And, of particular importance in this case, the NGPA does not include § 107(c)(5) tight formation gas or § 108 stripper well gas on the face of the deregulation provisions of § 121.

III.

FERC announced a Notice of Proposed Rulemaking on September 13, 1984 to implement the deregulation provisions of § 121 of the NGPA. Deregulation and Other Pricing Changes on January 1, 1985, Under the Natural Gas Policy Act, 49 Fed. Reg. 36,399 (1984). Natural gas producers, pipelines, public utility commissions, consumer groups, and other interested parties filed extensive comments on the proposed rules. FERC then issued an order promulgating final rules interpreting § 121. 49 Fed. Reg. 46,874 (1984). After several parties sought a rehearing, FERC upheld that part of its earlier order relating to dual qualification gas but reversed that part of its earlier order concerning intrastate gas. 49 Fed. Reg. 50,637 (1984). FERC then declined to review its order on rehearing. 50 Fed. Reg. 7,333 (1985). Natural gas producers appeal from both of FERC's conclusions on rehearing. Jurisdiction is established in this court pursuant to the judicial review provisions of the NGPA. 15 U.S.C. § 3416.

We first note our standard of review of FERC interpretations of the NGPA. Our first inquiry is whether "Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (footnote omitted). *Accord Office of Consumers' Counsel, Ohio v. FERC*, 783 F.2d 206 (D.C. Cir. 1986) (upholding

as reasonable one FERC interpretation of the NGPA but reversing a second FERC interpretation because it conflicted with the plain meaning of the statute); *Nevada Power Co. v. Watt*, 711 F.2d 913, 920 (10th Cir. 1983). We will defer when an agency has chosen between alternative possible constructions of an ambiguous statute:

> If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., 467 U.S. at 843 (footnotes omitted). Where the plain words of the statute do not answer a particular question, the agency interpretation must be reasonable, but it need not be the only reasonable interpretation or the interpretation that the reviewing court would adopt. *See, e.g., Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985). A reviewing court will defer to an agency interpretation of an ambiguous statute unless the agency interpretation is contrary to the policies Congress sought to implement in enacting the statute. *See, e.g., Chevron U.S.A.*, 467 U.S. at 843 n.9; *Mid-Louisiana Gas Co.*, 463 U.S. at 342 (rejecting a FERC interpretation of the NGPA because it was contrary to the history, structure, and basic philosophy of the NGPA and would frustrate the policy Congress sought to implement).

IV.

FERC has interpreted the NGPA to provide that if a sale of natural gas has been determined to qualify for both a deregulated category and a regulated category, the

deregulated category will always determine the applicable price.[4] The producers challenge FERC's interpretation in this court. We reverse and remand because FERC's interpretation is contrary to the clear intent of Congress as expressed in the unambiguous language of the NGPA.

A.

The first section of the NGPA that we must consider is § 121, which provides that "the provisions of part A of this subchapter respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall . . . cease to apply" on specified dates. 15 U.S.C. § 3331(a). FERC interprets the language "shall . . . cease to apply" to mean that if gas has been determined to be in one of the listed categories, there is no longer a ceiling price for such gas even if the gas has also been determined to be in a category that is not listed.[5] For example,

[4] FERC promulgated the following regulation in support of its interpretation:

§ *270.208 Applicability of section 121.*

First sales of natural gas that is deregulated natural gas as defined in [18 C.F.R.] § 272.103(a) is price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

18 C.F.R. § 270.208 (1986).

[5] FERC explained it[s] understanding of § 121 as follows:

The statute clearly states that price controls for certain section 102(c), qualifying section 103(c) and section 105 gas "shall . . . cease to apply January 1, 1985." NGPA section 121 mandates deregulation for these categories of gas. The fact that some of this gas also qualifies for another gas category does not alter this Congressional mandate to deregulate.

49 Fed. Reg. at 50,638.

if a producer has received a determination that gas is both new gas within the meaning of § 102 and stripper well gas within the meaning of § 108, once the ceiling price for § 102 was abolished in 1985, there is no longer a ceiling price for such gas despite the fact that the ceiling price for § 108 was not eliminated by the express language of § 121.[6]

The producers, on the other hand, argue that § 121 was not intended to determine whether dual category gas is to receive a regulated price or a deregulated price. They interpret § 121 to deregulate only those categories of gas that are listed. The producers rely on the report of the Conference Committee, which states: "The conference agreement does not provide for deregulation of any natural gas production not specifically enumerated in [§ 121]." Conf. Rep. at 92. Additionally, the Supreme Court has said that "Sections 121 and 122 of the NGPA provide a mechanism for the ultimate decontrol of *a number of categories* of natural gas." *Mid-Louisiana*, 463 U.S. at 336 n.14 (emphasis added). According to the producers, then, the language "shall . . . cease to apply" in § 121(a) provides for the elimination of the ceiling price only for those categories that are listed. The producers disagree with FERC's conclusion that § 121 requires dual category gas to receive a deregulated price.

We conclude that § 121 is ambiguous. Therefore, in the absence of another provision in the statute, FERC's determination that dual category gas is to be considered deregulated would be a reasonable interpretation of the ambiguous language of § 121. But Congress anticipated precisely this question in § 101(b)(5).

[6] Two types of gas that can be dually qualified within a regulated category and a deregulated category received particular attention from the commenters to the FERC order. First, tight formation gas under § 107(c)(5) can also be new gas under § 102 or § 103. Second, stripper well gas under § 108 can also be new gas under § 102 or § 103. *See* 49 Fed. Reg. at 46,877-78; 49 Fed. Reg. at 50,637 n.7.

B.

The NGPA established several "Rules of general application" for interpretation of the Act.[7] 15 U.S.C. § 3311(b). *See also* Conf. Rep. at 74 ("The conference agreement includes several rules of general application to be used in interpreting this Act."). One of these rules concerns "Sales qualifying under more than one provision" of the Act:

> If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

NGPA § 101(b)(5), 15 U.S.C. § 3311(b)(5). The plain language of this section addresses the very question that we are considering now: if gas has been determined to be dually qualified in a regulated category and a deregulated category, the category that could result in the highest price for the gas will apply.[8] FERC, however, has said that

[7] The FERC order relied on the general principle of statutory construction that "if there exists a conflict in the provisions of the same act, the last provision in point of arrangement must control." *Lodge 1858, Am. Fed'n of Gov't Employees v. Webb*, 580 F.2d 496, 510 (D.C. Cir.) (citing eighty-three cases), *cert. denied*, 439 U.S. 927 (1978). We do not perceive a conflict between § 121 and § 101(b)(5). Furthermore, a general principle of statutory construction cannot prevail over the "Rules of general application" specified in the NGPA itself.

[8] We are the first court to consider the operation of § 101(b)(5) of the NGPA. Several decisions, however, have mentioned § 101(b)(5) in dicta. *Mid-Louisiana*, 463 U.S. at 335 ("§ 101(b)(5) of the Act specifies that if a volume of gas fits into more than one category, 'the provision which could result in the highest price shall be applicable' ") (citation omitted); *Amoco Prod. Co. v. Western Slope Gas Co.*, 754 F.2d 303, 305 (10th Cir. 1985) ("The NGPA further provides that,

§ 101(b)(5) is "helpful, but not dispositive" of this question.[9] 49 Fed. Reg. at 46,879. FERC has concluded that § 101(b)(5) does not apply to gas that has been determined to be in a deregulated category. This conclusion, however, is based on a strained construction of the unambiguous language of § 101(b)(5) and a misunderstanding of the purposes Congress sought to achieve in enacting the NGPA.

1.

Section 101(b)(5) applies to those categories of gas "providing for any maximum lawful price or for any *exemption* from such a price." Several commenters on the regula-

where gas falls within the scope of multiple categories prescribing different ceiling prices, the highest ceiling price is applicable."); *Columbia Gas Dev. Corp. v. FERC*, 651 F.2d 1146, 1156-57 (5th Cir. 1981) ("If the [§ 104] gas qualifies for incentive pricing under section 102(d), 107(c)(5), or 108, under the rule of section 101(b)(5) the highest ceiling price becomes the applicable ceiling price."); *Oklahoma v. FERC*, 494 F. Supp. 636, 645 (W.D. Okla. 1980) ("Gas qualifying in more than one category is entitled to the highest price . . . ."), *aff'd*, 661 F.2d 832 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982).

[9] FERC has considered two arguments that § 121 prevails against § 101(b)(5). It is first suggested that because § 121 includes particular exceptions to its provisions, *see* 15 U.S.C. § 3331(d)-(e), an exception for dually qualified gas should not be inferred. This argument, of course, assumes its conclusion: that § 121 deregulates gas that has been dually qualified. We have already concluded that § 121 does not address this situation. Second, several commenters asserted that § 101(b)(5) is a "provision of subtitle A" that "shall . . . cease to apply" on January 1, 1985, according to § 121. This argument proves too much. Section 101(b)(5) is one of the "Rules of general application" for the NGPA. 15 U.S.C. § 3311(b). Some of the other "Rules of general application" define certain terms used in the Act and make it clear that the Act does not nullify or supersede contract prices set below the applicable ceiling price. 15 U.S.C. § 3311(b)(1), (2), (9). We cannot seriously consider the suggestion that these definitions and rules no longer apply after January 1, 1985.

tion proposed by FERC argued that categories for which no price ceiling now exists—*i.e.*, deregulated gas—are not categories "providing . . . for any exemption from such a price." 15 U.S.C. § 3311(b)(5). FERC did not explicitly rely on this interpretation of "exemption," but it did recognize that "there may be some merit to these arguments." 49 Fed. Reg. at 50,638.

FERC has suggested that the reference to "any exemption from such a price" refers not to deregulated gas, but rather to the authority of FERC to provide for special ceiling prices in particular situations. 49 Fed. Reg. at 36,401.[10] We have no doubt that the reference to "exemption" in § 101(b)(5) can refer to those instances in which FERC can exercise its statutory authority to set a different ceiling price when special circumstances are present. It does not follow, however, that "exemption" does not refer to deregulated categories of gas as well. The plain meaning of "exemption from such a price" includes those categories for which a price ceiling no longer exists. This interpretation of "exemption" is also consistent with the meaning of "exemption" in § 101(b)(9) of the NGPA. Section 101(b)(9) provides:

> In the case of . . . any price which is established under any contract for the first sale of natural gas which is *exempted* under part B of this subchapter from the application of a maximum lawful price under this subchapter, such maximum lawful price, or such *exemption* from such a maximum lawful price, shall not supersede or nullify the effectiveness of the price established under such contract.

15 U.S.C. § 3311(b)(9) (emphasis added). FERC has interpreted this section to set forth "the effect of the contract, regardless of the statutorily imposed maximum lawful ceiling prices or *exemptions from ceiling prices, i.e., deregulated prices.*" 49 Fed. Reg. at 46,879 (emphasis added). Similarly, the Fifth Circuit has referred to "exemption" in § 101(b)(9) to mean deregulated prices. *Pennzoil Co. v. FERC*, 645 F.2d 360, 374 (5th Cir. 1981), *cert. denied,* 454 U.S. 1142 (1982). Recognizing that a word found in two sections of a statute is intended to have the same meaning in each section, *Sorenson v. Secretary of the Treasury*, 106 S. Ct. 1600, 1606 (1986) (citations omitted), we hold that the reference to "any exemption from such a price" in § 101(b)(5) includes categories of gas for which there is no longer a ceiling price. Accordingly, § 101(b)(5) anticipates the question of which category shall apply when gas has been determined to qualify both for a regulated category and a deregulated category.

[10] FERC has the authority to raise the ceiling price for several categories of gas to a price that is "just and reasonable." 15 U.S.C. § 3314(b)(2); 15 U.S.C. § 3316(c); 15 U.S.C. § 3319(b)(2).

2.

FERC construes § 101(b)(5) to provide the same answer to this question in every case: the deregulated category will always apply. The key to FERC's argument is the meaning of the word "could" in § 101(b)(5). Section 101(b)(5) provides that "the provision which *could* result in the highest price shall be applicable." FERC's interpretation of § 101(b)(5) relies on the obvious truth that the price of deregulated natural gas in an open market "could" theoretically reach infinity. No one contests this observation. FERC then argues that because the price of deregulated gas could theoretically rise indefinitely, it therefore "could" always be greater than the price of regulated gas. This is also true. But FERC has failed to construe "could" as broadly in considering regulated categories of gas as it has in considering deregulated categories of gas. FERC has the authority to raise the ceiling price for regulated gas in several categories to a price that is "just and reasonable." *See* 15 U.S.C. § 3314(b)(2);

15 U.S.C. § 3316(c); 15 U.S.C. § 3319(b)(2). Additionally, the ceiling prices for all categories of gas rise steadily under the statute. *See, e.g.*, 15 U.S.C. § 3312(b)(2) (describing the formula for the increase of the ceiling price of new gas). The price of regulated gas is therefore certain to rise, and is capable of reaching an indefinite "just and reasonable" rate. Thus, the price of deregulated gas in an abstract situation "could" be higher than the price of regulated gas, but the price of regulated gas "could" be higher than the price of deregulated gas. Such an understanding of "could"—one that considers only the theoretical possibilities—renders § 101(b)(5) meaningless. If either price "could" be higher than the other price, the explicit command of § 101(b)(5) that "the provision which could result in the highest price shall be applicable" serves no purpose. We will not interpret a statute in such a way that a particular provision has no meaning. *Nevada Power Co.*, 711 F.2d at 920 (citations omitted).

"Could" makes sense in § 101(b)(5) only in the context of how gas sales actually occur. The NGPA focuses on sales at a particular point in time. *See, e.g.*, 15 U.S.C. § 3315(a) (the ceiling price "shall apply to any first sale of natural gas delivered during any month"). Section 101(b)(5) therefore requires a comparison of the applicable price for each category at a particular moment. In most instances the contract between the producer and the pipeline specifies the price which is to apply to categories that have been regulated and categories that have been deregulated.[11] The contractual provision that "could"

[11] Natural gas producers and pipelines have anticipated the deregulation of natural gas. Accordingly, "[m]any contracts contain two clauses—one which sets the price if gas is regulated and one which is implemented if gas is deregulated." 49 Fed. Reg. at 46,878. Section 101(b)(5) provides that if gas is dually qualified in a regulated category and a deregulated category, the contractual price for regu-

result in the highest price in a particular month will establish the applicable category under § 101(b)(5).

lated gas in the regulated category is to be compared with the contractual price for deregulated gas in the deregulated category. The higher of these two prices will determine the applicable category for a particular month.

Many gas contracts establish a specific price for deregulated gas or provide that the deregulated price is determined by the price of other gas sales. *See generally Materials on Oil & Gas Contracts* 10-11, 481-82 (J. Lowe ed. 1985). In each of these instances the contract provides a specific price for deregulated gas that can be compared with the price for regulated gas.

However, "many gas sales contracts contain a clause which requires the parties to renegotiate the sales contract if deregulation occurs." 49 Fed. Reg. at 46,879. Such a provision results in a "Catch-22" situation because of § 101(b)(5): the deregulated category will apply only if the renegotiated price is greater than the regulated price, but the contractual provision calling for renegotiation does not take effect until the gas has been deregulated. Furthermore, the price of gas will probably never vary from the regulated price if the deregulated price is to be set by renegotiation. Gas will be sold at the regulated price unless the producer and the pipeline agree to a different price. A producer is unlikely to renegotiate for a price below the regulated price; a pipeline is unlikely to renegotiate for a price above the regulated price. The regulated price, then, will always prevail.

The effect of a renegotiation clause might suggest that FERC is correct: § 101(b)(5) was not meant to apply to categories of gas that have been deregulated. As we have shown, however, the plain language of § 101(b)(5) refers to categories of gas that are exempt from ceiling prices—deregulated categories. And as we will show, FERC's intepretation of § 101(b)(5) would deny the statutory right of a producer to qualify gas in the category or categories of his or her choice. For these reasons, we hold that § 101(b)(5) was intended to apply to categories of gas that have been deregulated. We recognize that the effect of a renegotiation clause is to create an anomaly in the operation of the NGPA in certain circumstances, but we defer to Congress for the appropriate resolution of this difficulty. *See Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 106 S.Ct. 681, 689 (1986).

3.

Much of the concern voiced by the intervenor pipelines and FERC suggests that § 101(b)(5) was not intended to allow producers an ongoing choice as to whether gas sales are to be regulated or deregulated. In a sense, this is correct, for § 101(b)(5) does not speak in terms of a choice or an election. Instead, § 101(b)(5) provides that whichever category could produce a higher price *shall* apply. But producers are clearly presented with a choice as to which category or categories for which they seek to qualify particular gas. This is the election that the statute allows and which FERC would deny.

FERC has concluded that "a determination that gas qualifies as new tight-formation gas is implicitly a determination that the gas meets the qualifications for either section 102(c) or 103." 49 Fed. Reg. at 46,880; *see also* 49 Fed. Reg. at 50,639. FERC recognizes that such a dual qualification was unlikely to have been explicit at the time the determination was made. Nevertheless, a producer who decided to qualify gas *only* as tight formation gas under § 107(c)(5), a category that is not listed for deregulation in § 121, would be held by FERC to have also obtained a determination that the gas is new gas under § 102 or § 103—categories which have now been deregulated. There is no support for such automatic determinations in the NGPA. Although the showing required for a qualification under § 107(c)(5) would usually support a qualification under § 102 or § 103,[12] Congress did not provide that one qualification would automatically

[12] The information required to receive a determination that gas qualifies as new tight formation gas includes the information required to qualify gas as new gas under § 102 or a new onshore production well under § 103. 18 C.F.R. § 274.205(e)(1)(i) (1986). Recompletion tight formation gas, however, cannot necessarily be qualified under any other category. 49 Fed. Reg. at 46,880 n.18.

result in a second qualification. Instead, Congress intended that a producer select the category or categories for which he or she desires to qualify particular gas. In describing the operation of § 101(b)(5), Representative Dingell stated:

> Of course this does not impose upon either the FERC or any state agency an affirmative obligation to identify which of several potential classifications should apply. It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him (in most cases that will be the designation which also yields the highest price).

124 Cong. Rec. 38,363-64 (1978). Similarly, Senator Jackson said that § 101(b)(5) "stands for the proposition that a producer may claim or apply for the highest price to which he is entitled. It does not imply an administrative duty to compel a State or Federal agency to search through the various price classifications under the act and find the permissible price." 124 Cong. Rec. 29,109 (1978).

FERC's order thus rests on the erroneous assumption that gas can be determined to qualify for a particular category without going through the specific determination procedure set forth in § 503. For this reason, FERC's intepretation cannot be upheld.[13]

[13] In addition to implicitly determining that gas qualifies for a category for which a producer has not applied, FERC would limit the period during which a producer could obtain a determination. According to FERC, a producer must apply for a determination that gas qualifies for a particular category before deregulation goes into effect. Brief of Respondent at 30. Section 101(b)(5) then operates to allow a producer to qualify gas in two categories and obtain the higher ceiling price until one of the categories has been deregulated. Upon deregulation, however, the decision of the producer to obtain a determination that the gas qualifies for a category that has now been deregulated means that the gas is now deregulated and no ceiling price applies.

We do not know why FERC believes there is a particular date after which a producer cannot obtain a determination that gas qualifies for

C.

Although we have concluded that the clear language of the NGPA requires us to reject FERC's treatment of dual category gas, we recognize that FERC suggests that the goals of the NGPA support its position. FERC has defended its interpretation as "consistent with the overall scheme envisioned by Congress when it enacted the NGPA—to provide incentive prices to encourage exploration and development of new reserves in the short-term, and to gradually substitute market forces for regulated prices by phasing in deregulation in 1985 and 1987." 49 Fed. Reg. at 36,401; 49 Fed. Reg. at 46, 878. FERC has properly recognized the statutory "goal of increasing energy supplies." 49 Fed. Reg. at 50,638. But FERC has concluded, "It is our belief that the statutory intent to deregulate takes precedence over the statute's increased supply objective." 49 Fed. Reg. at 46,878.

FERC has confused the ultimate purpose of the statute—"to assure adequate supplies of natural gas at fair prices," *Transcontinental Gas Pipe Line Corp.*, 106 S. Ct. at 716—with one of several means chosen to accomplish that purpose—phased deregulation. FERC is correct that "phased deregulation was one of the primary methods utilized by Congress to increase energy supplies." 49 Fed. Reg. at 50,638 (footnote omitted). But the NGPA was the "careful reconciliation of two strong, but divergent, responses to the natural gas shortage." *Mid-Louisiana*,

a particular category. Nothing in the statute requires such a result. Indeed, FERC still requires producers who wish to sell gas that could be qualifed only under a category that has been deregulated to obtain a determination that the gas qualifies for that category. 49 Fed. Reg. at 46,875-76. It is thus difficult for FERC to maintain that a producer must qualify gas in a particular category before the date deregulation takes effect.

463 U.S. at 331.[14] Incentive prices for difficult to produce gas are another means by which Congress sought to increase energy supplies.[15] We do not agree with FERC that

[14] Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 106 S. Ct. 681, 689 (1986).

[15] "The new statutory rates are intended to provide investors with adequate incentives to develop new sources of supply." *Mid-Louisiana*, 463 U.S. at 334. In particular, "Section 108 is a special incentive rate for stripper wells, that is, marginal production. . . . The § 108 rate . . . is the highest regulated rate provided for by the NGPA." *Pennzoil Co.*, 645 F.2d at 380 n. 39.

The Congressional debate over the NGPA provides somewhat contradictory indications as to whether stripper well gas was to be considered deregulated after new gas was deregulated. Representative Dingell's statement that dual qualification "would permit the producer to obtain stripper well pricing under section 108 prior to January 1, 1985, and deregulation as new gas thereafter" could support either interpretation of § 101(b)(5) in light of his assumption that the deregulated price of natural gas would be higher than the regulated price by 1985. 124 Cong. Rec. 38,364 (1978). FERC places greater weight on the statement of Senator Bartlett:

> [I]n informal discussions on the floor it has been asserted that stripper wells are deregulated. This is true only to the extent that such wells are otherwise new wells and would be deregulated anyway. Their character as stripper wells, as shown under section 121, does not get them deregulated in any way. And since the vast majority of all stripper wells are wells now in existence, there would be very little deregulation caused by that section.

124 Cong. Rec. 31,387 (1978). At another point in the debate, however, Senator Bartlett said, "This bill will keep under Federal controls *forever* the following categories of natural gas: all flowing interstate gas; all offshore gas produced from present leases, including

the incentive prices are necessarily short-term.[16] These prices are never removed by the express language of § 121, so gas that qualifies only for an incentive price category will unquestionably remain regulated. Deregulation is both phased *and* partial. *See* A. Tussing & C. Barlow, *The Natural Gas Industry* 116 (1984) (noting that old gas is never deregulated under the NGPA). By misinterpreting the NGPA to be exclusively a deregulation statute, FERC has overlooked incentive prices and other provisions that sought to address the natural gas shortage in a different way. We will not strain the plain meaning of § 101(b)(5) in order to serve a goal of deregulation that is itself only one of several means adopted to achieve the purposes of the NGPA.

Congress enacted the NGPA expecting that natural gas prices would rise steadily in future years. *See, e.g.*, 124 Cong. Rec. 38,361 (1978) (statement of Rep. Dingell); 124 Cong. Rec. 31,819 (statement of Sen. Metzenbaum). That prices have actually dropped precipitously accounts for

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the new discoveries; all intrastate gas under contract at a price below $1 per thousand cubic feet; and *stripper well natural gas*." 124 Cong. Rec. 29,379 (1978) (emphasis added). Furthermore, the Conference Report suggested that "natural gas qualifying as gas produced from a natural gas stripper well [could be] sold subject to the provisions of sec. 108, rather than taking deregulated treatment as an existing intrastate contract." Conf. Rep. at 83. We give greatest weight to the position expressed in the Conference Report.

[16] In *Transcontinental Pipe Line Gas Corp.*, 106 S. Ct. at 716-17, the Court referred to "Congress' determination, that the supply, the demand, and the price of high-cost gas to be determined by market forces." The type of high-cost gas at issue in that case was § 107(c)(1) gas "produced from any well [with] a completion location which is located at a depth of more than 15,000 feet." 15 U.S.C. § 3317(c)(1). The ceiling price for § 107(c)(1) gas was eliminated by the express provision of § 121(b), thereby demonstrating Congress' intent that market forces should determine the price for such gas. In contrast, the incentive prices for, *inter alia*, § 107(c)(5) and § 108 gas are never eliminated by § 121.

the anomalous situation we now see: producers seek the regulated ceiling price rather than the deregulated market price.[17] Because § 101(b)(5) provides that the category which could result in the highest price applies, gas that has been qualified in both a regulated category and a deregulated category will now be sold at the regulated price until the market price rises above the ceiling price. Therefore, § 101(b)(5) can have the unanticipated effect of operating as a price floor for producers. Congress did not expect this result, for Congress did not expect that natural gas prices would fall. Changes in economic conditions, however, do not provide the courts with a license to change the express terms of a statute. *See BankAmerica Corp. v. United States*, 462 U.S. 122, 133 (1983).

We observe that the Supreme Court was confronted with a similar problem earlier this year. In *Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 106 S. Ct. 681 (1986), the Court considered a definition of "bank" selected by the Federal Reserve Board because it was thought to be consistent with the broad purposes of the Bank Company Holding Act, 12 U.S.C. §§ 1841-1850. The Court referred to a similar situation that it had considered previously:

> The process of effectuating Congressional intent at times may yield anomalies. In *TVA v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) [holding that the express language of the Endangered Species Act did not admit of an exception when an almost completed multi-million dollar dam project threatened

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[17] Natural gas producers advanced the interpretation adopted by FERC in this case when market conditions would have produced a higher price for deregulated gas. *See* Interim Rule Covering High-Cost Natural Gas Produced from Tight Formations, 45 Fed. Reg. 13,422 (1980).

> to render the three-inch snail darter extinct], for example, we were confronted with the explicit language of a statute that in application produced a curious result. Noting that nothing prohibited Congress from passing unwise legislation, we upheld the enforcement of the statute as Congress had written it. Congress swiftly granted relief to the petitioner in *Hill*; but did so in a fashion that could not have been tailored by the courts. See Pub.L. 95-632, § 5, 92 Stat. 3760.

Id. at 689 n.7. The Court in *Dimension* held that the definition proposed by the Federal Reserve Board conflicted with the plain language of the Act, concluding that "[t]he statute may be imperfect, but the Board has no power to correct flaws that it perceives in the statute it is empowered to administer." *Id.* at 689.

Congress is capable of modifying the operation of § 101(b)(5) if it desires to do so. This court, however, will not undertake that task. Our role is simply to give effect to the words Congress has chosen. We therefore hold that FERC acted contrary to the intent of Congress as evidenced in the unambiguous language of § 101(b)(5). We reverse and remand for further proceedings consistent with this opinion.

V.

The second FERC order that we review concerns the deregulation of intrastate gas. A trio of statutory provisions—§§ 121(a)(3), 121(e), and 105(b)(3)(A)—determine the status of intrastate gas that is sold pursuant to a contract that existed at the time of the enactment of the NGPA. 15 U.S.C. § 3331(a)(3); 15 U.S.C. § 3331(e); 15 U.S.C. § 3315(b)(3)(A). FERC adopted a different construction of these provisions on rehearing than it had in its original order. *Compare* 49 Fed. Reg. at 46,880 (final rule)

with 49 Fed. Reg. at 50,640-41 (order on reh'g). Only Shell appeals from the order on rehearing. We affirm.

Section 121(a)(3) provides for the deregulation of:

> Natural gas sold under an existing contract, any successor to an existing contract, or any rollover contract if—
>
> (A) such natural gas was not committed or dedicated to interstate commerce on November 8, 1978; and
>
> (B) the price paid for the last deliveries of such natural gas occurring on December 31, 1984, or, if no deliveries occurred on such date, the price would have been paid had deliveries occurred on such date is higher than $1.00 per million Btu's.

15 U.S.C. § 3331(a)(3). In essence, § 121(a)(3) deregulates intrastate gas that is sold under a contract that set a price in excess of $1.00 on December 31, 1984.

Once such gas has been deregulated, it can become subject to a "special rule" limiting the price that can be obtained pursuant to an indefinite price escalator clause.[18] Conf. Rep. at 83. Congress was concerned that "following deregulation, the operation of indefinite price escalator clauses . . . could operate to increase rapidly intrastate gas prices following deregulation." 124 Cong. Rec. 38,365 (1978) (statement of Rep. Dingell). Therefore, sections 121(e) and 105(b)(3)(A) were included to avoid rapid price increases by restricting the operation of indefinite price

[18] An "indefinite price escalator clause" is a contractual provision:

> (i) which provides for the establishment or adjustment of the price for natural gas delivered under such contract by reference to other prices for natural gas, for crude oil, or for refined petroleum products; or
>
> (ii) which allows for the establishment or adjustment of the price of natural gas delivered under such contract by negotiation between the parties.

15 U.S.C. § 3315(b)(3)(B).

escalator clauses. Section 121(e) provides that § 105(b)(3)(A) applies to natural gas that has been deregulated by § 121(a)(3) and "which is sold under any existing contract or successor to an existing contract at a price established under an indefinite price escalator clause." 15 U.S.C. § 3331(e). Section 105(b)(3)(A), in turn, provides:

> Effective January 1985, and each month thereafter, in the case of any first sale of natural gas, which is sold at a price established under any indefinite price escalator clause of any existing contract or successor to an existing contract and for which the contract price on December 31, 1984, is higher than $1.00 per million Btu's, the maximum lawful price . . . shall be [established pursuant to a formula set forth in this section].

15 U.S.C. § 3315(b)(3)(A). FERC and Shell agree that the special rule embodied in § 105(b)(3)(A) operates to limit only those price increases caused by an indefinite price escalator clause. The parties disagree about the category of gas to which the special rule applies.

FERC has concluded that "the section 121(e) and section 105(b)(3)(A) limitation applies to any indefinite price escalator clause in an existing or successor intrastate contract that is, or would have been in excess of $1.00 per MMBtu on December 31, 1984." 49 Fed. Reg. at 50,641. Shell argues that the limitation applies to intrastate contracts only "if they were above $1.00 on December 31, 1984 *solely by reason of indefinite price escalator clauses.*" Supplemental Initial Brief of Shell Offshore Inc. and Shell Western E&P Inc. at 12 (emphasis original). The crucial difference is this: the FERC interpretation does not focus on how the price was established on December 31, 1984, while Shell would limit the application of the special rule

to those circumstances in which the indefinite price escalator clause established the price on December 31, 1984.

We hold that FERC has adopted a reasonable interpretation of the provisions of the NGPA that deregulate intrastate natural gas sales. The plain language of § 105(b)(3)(A) does not demand the interpretation advanced by Shell. Sections 105(b)(3)(A) and 121(e) impose a special rule limiting the price that can now be established by an indefinite price escalator clause. Those sections, however, do not contain the additional requirement that the December 31, 1984 price be established by an indefinite price escalator clause. The Conference Report makes it clear that *how* the December 31, 1984 price exceeded $1.00 is not relevant:

> This special rule limits the operation of indefinite price escalator clauses in existing intrastate contracts for which the contract price on December 31, 1984 is higher than $1.00 per MMBtu's. . . . This limitation applies to natural gas which is deregulated solely as a result of qualifying as an existing contract or a successor to an existing contract in excess of $1.00 per million Btu's on or before December 31, 1984.

Conf. Rep. at 83. Nor does the agreement reached by the conferees suggest that how the price was established on December 31, 1984 is important:

> [I]f the price of natural gas under the contract was greater than $1.00/MM Btu's on December 31, 1984, the price thereafter charged for natural gas . . . subject to such contract may not exceed [the ceiling price imposed by the special rule] due to the operation of any indefinite price escalator clause in such contract.

Staff of House Comm. on Interstate and Foreign Commerce & Staff of Senate Comm. on Energy and Natural Resources, 95th Cong., 2d Sess., *Natual Gas Pricing*

Agreement Adopted by the Conferees on H.R. 5289 18-19 (Comm. Print. 1978).

Shell has suggested that the reference to $1.00 per million Btu's in § 105(b)(3)(A) is superfluous under FERC's construction of the statute. Section 121(a)(3) deregulates only that natural gas which exceeds the $1.00 threshold. The additional reference to the threshold in § 105(b)(3)(A) is necessary to limit the application of the special rule to gas that was priced above $1.00 on December 31, 1984. Without such a reference in § 105(b)(3)(A), the special rule would also apply to natural gas that was sold at a price below $1.00 on December 31, 1984 and therefore has not been deregulated by § 121(a)(3). The $1.00 threshold thus operates to distinguish between two schemes of regulation. Gas priced below $1.00 on December 31, 1984 remains subject to the ceiling price imposed by § 105(b). Gas priced above $1.00 on December 31, 1984 is subject to a slightly different ceiling on the price established by an indefinite price escalator clause. Accordingly, FERC's interpretation has properly given effect to all parts of the statute.

VI.

FERC's conclusion that natural gas that has been qualified both in a regulated category and a deregulated category is always to be considered deregulated is contrary to the express language of § 101(b)(5) of the NGPA. Accordingly, we reverse and remand that part of the order. FERC's interpretation of the provisions governing the deregulation of intrastate gas is reasonable. We therefore affirm that part of the order.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARCH TERM, 1987

Nos. 84-2756, 84-2759, 84-2760, 85-1172, 85-1250, 85-1254, 85-1257, 85-1443, and 85-1452.

MARTIN EXPLORATION MANAGEMENT COMPANY, COLORADO ENERGY CORPORATION, PHILLIPS PETROLEUM COMPANY, PHILLIPS OIL COMPANY, EXXON CORPORATION, SHELL OFF-SHORE, INC., SHELL WESTERN E & P, INC., INDEPENDENT OIL & GAS ASSOCIATION OF WEST VIRGINIA, AND AMOCO PRODUCTION COMPANY, PETITIONERS,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT,

ARCO OIL & GAS COMPANY, OHIO OIL AND GAS ASSOCIATION, INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA, GULF OIL CORPORATION, SUCCESSOR TO CHEVRON, U.S.A., INC., UNION OIL COMPANY OF CALIFORNIA, CHAMPLIN PETROLEUM COMPANY, PENNZOIL COMPANY, PENNZOIL OIL & GAS, INC., PENNZOIL PRODUCING COMPANY, PLACID OIL COMPANY, TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO, PACIFIC GAS & ELECTRIC COMPANY, AMOCO PRODUCTION COMPANY, TRANSOK, INC., OKLAHOMA NATURAL GAS COMPANY, A DIVISION OF ONEOK, INC., ASSOCIATED GAS DISTRIBUTORS, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PACIFIC LIGHTING GAS SUPPLY COMPANY, SOUTHERN CALIFORNIA GAS COMPANY, CONSOLIDATED GAS TRANSMISSION CORPORATION, PANHANDLE EASTERN PIPE LINE COMPANY, CITIES SERVICE OIL AND GAS CORPORATION, GRACE PETROLEUM CORPORATION, VALERO TRANSMISSION COMPANY, BHP PETROLEUM COMPANY,

INC., SUCCESSOR TO MONSANTO OIL COMPANY, TEXAS EASTERN TRANSMISSION CORPORATION, TRANSWESTERN PIPELINE COMPANY, UNITED GAS PIPE LINE COMPANY, UNITED TEXAS TRANSMISSION COMPANY, AND TEXAS GAS TRANSMISSION CORPORATION, INTERVENORS.

[Filed May 1, 1987]

Before Honorable James E. Barret, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, and Honorable Bobby R. Baldock, Circuit Judges.

On consideration of the petitions for rehearing, the panel that rendered the decision modifies the original opinion as follows:

1. The first line on page 22 of the slip opinion [page 17a, *supra*] is modified to read ". . . the highest price at a particular moment will establish the . . . ."
2. Add the following paragraph to footnote 12 on page 23 [page 18a, *supra*]:

   The specification of what types of gas are "produced under such other conditions as [FERC] determines to present extraordinary risks or costs" and thus qualify under § 107(c)(5) is obviously left to the discretion of FERC. Our decision in this case does not interfere with FERC's continuing authority to modify the criteria that establish which types of gas qualify under § 107(c)(5).

3. The first sentence of the second paragraph on page 28 [page 23a, *supra*] should read:

   "We observe that the Supreme Court was confronted with a similar problem last term."

Upon modifications of the opinion, the petitions for rehearing are denied by the panel that rendered the opinion.

The petitions for rehearing having been denied by the panel to whom the cases were argued and submitted, and no member of the panel or judge in regular active service on the court having requested a poll on rehearing en banc, Fed. R. App. P. 35, the suggestions for rehearing en banc are denied.

Chief Judge Holloway took no part in consideration of the suggestion for rehearing en banc.

ROBERT L. HOECKER
Clerk

By: /s/ PATRICK FISHER
Patrick Fisher
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARCH TERM, 1987

Nos. 84-2756; 84-2759; 84-2760; 85-1172; 85-1250; 85-1254; 85-1257; 85-1443; 85-1452; 85-1255 and 12-1256

MARTIN EXPLORATION MANAGEMENT COMPANY; COLORADO ENERGY CORPORATION; PHILLIPS PETROLEUM COMPANY; PHILLIPS OIL COMPANY; EXXON CORPORATION; SHELL OFF-SHORE, INC.; SHELL WESTERN E & P, INC.; INDEPENDENT OIL & GAS ASSOCIATION OF WEST VIRGINIA, AND AMOCO PRODUCTION COMPANY, PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION, RESPONDENT,

AND

ARCO OIL & GAS COMPANY; OHIO OIL AND GAS ASSOCIATION; INDEPENDENT OIL AND GAS ASSOCIATION OF WEST VIRGINIA; GULF OIL CORPORATION, SUCCESSOR TO CHEVRON, U.S.A., INC.; UNION OIL COMPANY OF CALIFORNIA; CHAMPLIN PETROLEUM COMPANY; PENNZOIL COMPANY, PENNZOIL OIL & GAS, INC., PENNZOIL PRODUCING COMPANY; PLACID OIL COMPANY; TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO, INC.; PACIFIC GAS & ELECTRIC COMPANY; AMOCO PRODUCTION COMPANY; TRANSOK, INC.; OKLAHOMA NATURAL GAS COMPANY, A DIVISION OF ONEOK, INC.; ASSOCIATED GAS DISTRIBUTORS; PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; PACIFIC LIGHTING GAS SUPPLY COMPANY; SOUTHERN CALIFORNIA GAS COMPANY; CONSOLIDATED GAS TRANSMISSION CORPORATION; PANHANDLE EASTERN PIPE LINE COMPANY; CITIES SERVICE OIL AND GAS CORPORATION; GRACE PETROLEUM CORPORATION; VALERO TRANSMISSION COMPANY; BHP PETROLEUM COMPANY,

INC., SUCCESSOR TO MONSANTO OIL COMPANY; TEXAS EASTERN TRANSMISSION CORPORATION; TRANSWESTERN PIPELINE COMPANY; UNITED GAS PIPE LINE COMPANY; UNITED TEXAS TRANSMISSION COMPANY; AND TEXAS GAS TRANSMISSION CORPORATION, INTERVENORS.

[Entered March 9, 1987]

Before the Honorable James E. Barret, Honorable Deanell R. Tacha, Circuit Judges and Honorable Wesley E. Brown, District Judge*

JUDGMENT

This cause came on to be heard upon the petitions for review of orders interpreting the statutory mandate in § 121 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3331, to deregulate certain natural gas prices. The matter was heard on the administrative record on the Commission and was argued by counsel.

Upon consideration whereof, it is ordered that the orders of the Federal Energy Regulatory Commission are affirmed in part. The orders are reversed in part. The cause is remanded to the Federal Energy Regulatory Commission for further proceedings consistent with the opinion of this court.

/s/ ROBERT L. HOECKER
Robert L. Hoecker
Clerk

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*The Honorable Wesley E. Brown, District Judge of the District of Kansas, sitting by designation.

APPENDIX D

Federal Energy Regulatory Commission

18 CFR Parts 270, 271, 272, 273, and 274

[Docket No. RM84-14-000]

Deregulation and Other Pricing Changes on January 1, 1985, Under the Natural Gas Policy Act

Issued: September 13, 1984.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: On January 1, 1985, the Natural Gas Policy Act of 1978 (NGPA) will deregulate the prices for substantial amounts of interstate and intrastate gas. The Federal Energy Regulatory Commission (Commission) proposes to amend its regulations to prepare for price deregulation under section 121 of the NGPA for certain types of natural gas subject to sections 102, 103, 105, and 106 and new maximum lawful prices under sections 103(b) and 105(b)(3).

DATES: An original and 14 copies of comments must be filed by October 17, 1984. A public hearing will be held on October 11, 1984. Requests to participate in the public hearing must be submitted by October 4, 1984.

ADDRESS: All filings should refer to Docket No. RM84-14-000 and should be addressed to: Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426.

FOR FURTHER INFORMATION CONTACT:

Leslie Lawner, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426 (202) 357-8511.

Ken Malloy, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426 (202) 357-8033.

SUPPLEMENTARY INFORMATION: On January 1, 1985, the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301-3432 (1982), will deregulate the prices for substantial amounts of interstate and intrastate gas. The Federal Energy Regulatory Commission (Commission) proposes to amend its regulations to prepare for price deregulation under section 121 of the NGPA for certain types of natural gas subject to sections 102, 103, 105, and 106 and new maximum lawful prices under sections 103(b) and 105(b)(3).

I. Background

At the time Congress was considering the NGPA, oil prices were rising and increasing demand and declining supplies of natural gas created severe shortages in many parts of the nation. Political concern about these market distortions, as well as concern about the nation's energy dependence, led Congress to enact legislation revamping the natural gas pricing structure that had existed under the Natural Gas Act (NGA) and eventually to phase in market forces as a substitute for that structure for a substantial amount of our nation's gas supplies. Thus, in 1978, Congress deregulated some gas shortly after the enactment of the NGPA, provided for deregulation of prices for other categories of gas over the next decade, and retained regulatory and pricing controls on other gas wells until these wells are depleted.

Title I of the NGPA created several categories of natural gas, the first sale of which is subject to maximum lawful prices (ceiling prices). Those categories are based on a variety of factors, such as the date the well was

drilled, whether the gas was sold under intrastate contracts or committed or dedicated to interstate commerce (dedicated gas), and the need for incentives to produce gas that is otherwise difficult or uneconomical to produce. In contrast, the price of certain natural gas produced from completion locations deeper than 15,000 feet, geopressured brine, coal seams, or Devonian shale was deregulated in 1979, shortly after enactment of the NGPA. Moreover, under section 121, the price for some sections 102 and 103 gas and certain intrastate gas will be deregulated on January 1, 1985, while additional section 103 gas will be deregulated on July 1, 1987. In addition to price deregulation, Congress also mandated higher ceiling prices on January 1, 1985, for certain categories of gas under sections 103 and 105.

II. Discussion

This rulemaking generally concerns categories of natural gas that will be price deregulated under section 121. On January 1, 1985, section 121(a) eliminates price controls from "new natural gas" defined in section 102(c)[1] and certain gas produced from "new, onshore production wells" under section 103.[2] Subject to section 121(e), section 121 also deregulates the price of intrastate gas that is

[1] "New natural gas" under section 102(c) covers three types of gas: (1) Gas produced from the Outer Continental Shelf under a lease entered into after April 20, 1977; (2) gas produced from an onshore well on which surface drilling began on or after February 19, 1977, or the depth was increased by 1,000 feet on or after that date, and which is at least 2.5 miles from the nearest marker well or which is 1,000 feet deeper than the deepest completion location of any marker well within 2.5 miles; and (3) gas produced from a reservoir from which natural gas was not produced in commercial quantities before April 20, 1977, subject to certain exclusions. Section 121 deregulates all three types of gas.

[2] "New, onshore production wells" under section 103(c) are onshore wells on which surface drilling began on or after February 19, 1977,

subject to section 105 or 106(b) if the price paid for the last deliveries of such natural gas occurring on December 31, 1984 (or the price that would have been paid if no deliveries occurred on that date) is higher than $1.00 per MMBtu.[3]

The Commission has two goals in this rulemaking. The first is to resolve those legal and policy issues that are presented by deregulation of certain categories of gas under section 121. The second is to make technical amendments to the Commission's NGPA regulations to conform them to the pricing changes that will take effect on January 1, 1985.

A. Jurisdictional Agency Determinations

Section 503 establishes procedures under which well category determinations are made by State or Federal jurisdictional agencies and then reviewed by this Commission. Since enactment of the NGPA, this section and the Commission's implementing regulations have been used primarily for determining whether gas qualifies under a particular NGPA pricing category. With deregulation occurring on January 1, 1985, it appears that determinations will still be required before production can qualify for deregulated prices. This is due to the criteria that must be met before production qualifies for a deregulated category. Thus, even though section 121 deregulates the price of certain categories of gas, it appears that first

and from which gas is produced from a proration unit that meets certain requirements. Section 121 deregulates on January 1, 1985, the price of section 103 wells that were not committed or dedicated to interstate commerce on April 20, 1977, and that produce gas from a completion location deeper than 5,000 feet.

[3] Section 121(e) provides that, if the price for section 105 gas is over $1.00 per MMBtu because of the operation of an indefinite price escalator clause, gas will not be deregulated, but is subject to the ceiling prices in section 105(b)(3).

sellers must continue to file for determinations for certain categories of gas that will be price deregulated after the determination becomes final, where determinations previously have been required under Title I.

First, for sections 102 and 103 gas deregulated by section 121 and for which a producer has not filed for or obtained a determination prior to January 1, 1985, it appears that first sellers must continue to file applications for determinations with the appropriate jurisdictional agencies. The Commission is tentatively of the view that the NGPA requires a determination in this instance.

Under the determination process Congress established in section 503, jurisdictional agencies make certain factual findings about the well characteristics for certain categories of gas in Subtitle A of Title I of that Act. Subject to certain iterim [*sic*] collection procedures in section 503(e), an affirmative determination by the jurisdictional agency is a condition precedent to a first seller charging and collecting a specified price. Section 503 does not distinguish between gas that is regulated or deregulated, but attaches a substantive effect to a jurisdictional agency's application of the definitions in sections 102(c), 102(d), 103(c), 107(c) and 108(b). Nothing in section 503 or 121 indicates that Congress intended this substantive effect to be changed by deregulation on January 1, 1985. Thus, the Commission tentatively believes that the NGPA requires producers to obtain well category determinations, even for gas which will be price deregulated upon a final determination.

The Commission's approach to deregulation under section 107 followed this view. Under section 107(c), Congress deregulated the price of certain types of high-cost natural gas, *i.e.*, gas produced from completions below 15,000 feet, Devonian shale, geopressured brine, and occluded natural gas produced from coal seams. Section 503(a)(1) requires that a determination be made "applying

the definition of high-cost natural gas under section 107(c)." Similarly, section 107(c) requires that gas must be "determined in accordance with section 503 to be" high-cost gas. Given this NGPA mandate, the Commission required that producers obtain a determination in order for gas to be deregulated under section 107(c). This rule would adopt similar requirements for gas under sections 102(c) and 103 that will be deregulated on January 1, 1985.

The Commission is also considering alternative methods for meeting this statutory obligation. For example, it may be possible to establish a notice procedure similar to that used for obtaining qualifying status under section 210 of PURPA.[4] Under the procedure in § 292.207(a)(2), a party seeking to have qualifying status under PURPA for a cogeneration or small power production facility, may certify to the Commission in an informational filing that the facility meets the criteria in the rule, some of which are statutory in nature. The Commission requests comments on whether it has the authority under the NGPA to establish a similar procedure for well category determinations for deregulated gas and, if it does, whether such a procedure should be established. Comments are also invited on alternative means for carrying out the Commission's obligations under the statute, as well as the degree of latitude permitted by the statute.

Second, where a producer has already obtained a determination prior to January 1, 1985, that the gas qualifies as section 102(c) or 103 gas, the Commission is not proposing to require any additional determination that the gas is deregulated. Hence, the price for all section 102(c) or 103 gas that otherwise meets the prerequisites for deregulation is deregulated on January 1, 1985. Under this proposal, the producer would determine whether the gas meets any

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[4] Public Utility Regulatory Policies Act of 1978, 16 U.S.C. 2601, *et seq.*

additional criteria for a deregulation under section 121 of the NGPA. The Commission expects that pipelines will monitor a producer's decision as to whether or not the gas is deregulated. The Commission intends to review these decisions with audits and investigation of complaints.

Whether a section 103 application was filed before or after January 1, 1985, gas subject to that application must meet two criteria imposed by section 121 to be deregulated. It must not have been committed or dedicated to interstate commerce on April 20, 1977,[5] and it must be produced from a completion location deeper than 5,000 feet.[6] The Commission recognizes that it may have an

[5] For purposes of determining whether the gas was committed or dedicated to interstate commerce on April 20, 1977, the Commission intends to apply the definition in section 2(18) of the NGPA. Under the NGA, acreage subject to an interstate contract was not dedicated gas until gas actually commenced flowing in interstate commerce. Conversely, if no gas under the contract actually flowed in interstate commerce, then the gas was not dedicated gas under the NGA. Under section 2(18) of the NGPA, however, gas may be committed or dedicated to interstate commerce before flowing in interstate commerce, if, when sold, it "would be required to be sold in interstate commerce . . . under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act." *See generally, Conoco, Inc.* v. *FERC*, 622 F.2d 796 (5th Cir. 1980); *Tenneco Exploration Ltd.* v. *FERC*, 649 F.2d 376 (5th Cir. 1981). Hence, gas which, if sold, would have been required to be sold in interstate commerce under the terms of any contract, Natural Gas Act (NGA) certificate, or provision of such Act would be deemed committed or dedicated to interstate commerce on April 20, 1977.

[6] For purposes of determining whether the completion location is located at a depth of more than 5,000 feet, the Commission proposes to amend § 272.104 to apply to section 103 gas. Section 272.104 currently applies to section 107(c) high-cost natural gas which must, among other things, be produced from a completion location deeper than 15,000 feet and requires that the measurement "shall be the true vertical depth from the surface location to the highest perforation point of the completion location." 18 CFR 272.104 (1983). The Commission believes it is appropriate to use the same measurement definition for section 103 gas as for section 107(c) gas because it would be consistent with our current practice.

obligation to review the deregulation criteria for section 103 gas before a first seller may charge and collect the deregulated price. Therefore, the Commission is considering requiring producers of such gas to file an affidavit, either separately or as part of a determination application, with the Commission and the purchasing pipeline that the section 103 gas meets these criteria. Alternatively, the Commission could require a standard section 503 determination by jurisdictional agencies with review by this Commission prior to deregulation taking effect. While we recognize these options, especially the latter, would impose a significant burden on applicants, jurisdictional agencies, and this Commission, the Commission requests comments on all aspects of these options including its statutory responsibilities to require such review.

Third, where an application for a determination is pending before a jurisdictional agency or this Commission on January 1, 1985, and becomes final after January 1, 1985, the Commission is proposing that the determination must become final before the gas qualifies for deregulation. This follows from the first proposal that producers should be required to obtain a determination even for gas that will be price deregulated after January 1, 1985.

The fourth instance concerns "new tight formation gas" under section 107(c)(5). In order to qualify as new tight formation gas, a producer must file the same information, in addition to other information, that would be filed to qualify as a section 102 or 103 determination. 18 CFR 274.205(e)(1)(i)(A) or (B) (1983). Thus, a determination that gas qualifies as new tight formation gas is implicitly a determination that the gas meets the qualifications for either section 102(c) or 103. Accordingly, for new tight formation gas for which a producer has received a final determination prior to January 1, 1985, such gas would be

deregulated under section 121 if the application contained the data and met the requirements for section 102(c) or 103 gas.

B. Interim Collection

The Commission's regulations state two different rules governing the price a first seller may collect while an application is pending before the Commission. The first rule applies to gas that is subject to a ceiling and for which a determination is required under the NGPA. In that situation, the Commission's current regulations allow producers, subject to contractual authorization, to collect the highest ceiling price for which they applied. 18 CFR 273.202(a)(1) and 273.203(a)(1) (1983). The second rule applies to gas that is deregulated under section 107 and for which a determination is required. In that situation, the Commission's regulations allow a producer, subject to contractual authorization, to collect only up to the section 102 price, not a higher deregulated contract price, while a determination is pending before a jurisdictional agency or this Commission. 18 CFR 273.202(a)(2) and 273.203(a)(2) (1983).

The Commission is proposing several changes to its interim collection regulations in light of deregulation on January 1, 1985. First, §§ 273.202(a)(2) and 273.203(a)(2) would be amended to apply not only to section 107 gas, but also to sections 102(c) and 103 deregulated gas. Secondly, and more importantly, the Commission is proposing to eliminate the section 102 price cap on interim collections and permit a producer to collect the deregulated price while an application for a determination for such gas is pending before a jurisdictional agency or this Commission. This rule would apply both for applications pending on January 1, 1985, and for those filed after January 1, 1985. The deregulated price should be the price that the producer and purchaser agree should be collected during the interim period.

The Commission's experience in reviewing over 165,000 determinations for sections 102, 103, and 107 gas indicates that producers file for the correct category of gas for these sections in over 96% of the cases. Thus, the Commission believes that in the vast majority of cases no refunds will be necessary under its proposed rule. However, if it is finally determined that the gas does not qualify under these sections, the producer will, of course, be required to refund the difference between the price collected and the otherwise applicable ceiling price, with interest. 18 CFR 154.102(c) and (d) (1983). Moreover, all other aspects of the Commission's current interim collection regulations would remain in effect for such gas, such as the surety bond or escrow requirement options.

C. Gas Qualifying for Both a Regulated and a Deregulated Category

There may be instances where gas produced from a well qualifies for two NGPA categories, one regulated and one deregulated. For example, gas that may qualify as section 103 deregulated gas under section 121 might also qualify as stripper well gas, which remains regulated under section 108 of the NGPA. Depending upon a producer's contracts, there may be some instances where it is more advantageous to the producer to collect a regulated price rather than a deregulated price. For example, in the current gas market, a producer may claim a contractual right to receive a higher price if the gas can remain under a regulated category than if the gas is not subject to any applicable ceiling price by operation of section 121 of the NGPA. Therefore, the Commission may have to interpret the NGPA as to whether the ceiling price provisions of the NGPA apply to gas that meets the criteria for both a regulated and deregulated category of gas.

The Commission believes that Congress intended all price controls for gas specified in section 121 to terminate on January 1, 1985, whether or not the gas continued to

qualify for a regulated price. This interpretation is consistent with the overall scheme envisioned by Congress when it enacted the NGPA—to provide incentive prices to encourage exploration and development of new reserves in the short-term, and to gradually substitute market forces for regulated prices by phasing in deregulation in 1985 and 1987.

Arguably, section 101(b)(5) provides producers a choice to remain regulated if the regulated price is higher than the deregulated price. That section provides that if natural gas "qualifies under more than one provision of this title providing for any maximum lawful price or any exemption from such a price . . ., the provision which could result in the highest price shall be applicable."

The Commission seeks comments on whether conflicts between regulated and deregulated gas prices are governed by this section, for example, on the theory that deregulation is not an "exemption for such price with respect to any first sale." Under this approach, Congress may have intended the language regarding "exemption," rather than referring to deregulation, to refer to instances in which the otherwise applicable ceiling price would not apply, such as special relief under sections 104, 106, and 109. Congress foresaw the possibility that in administering the well category ceiling prices, it was conceivable that some gas would qualify for more than one ceiling price. Hence, it sought to clarify that the "provisions that permit the seller to obtain the highest price" would apply. Joint Explanatory Statement of the Committee on Conference, H.R. Rep. No. 1752, 95th Cong., 2d Sess. 74 (1978). The issue is whether Congress intended this section to supersede the explicit statutory requirement of deregulation in section 121, when phased-in deregulation was one of its primary objectives in enacting the statute.

In any event, the Commission recognizes that there may be many instances in which there will be contract disputes

regarding the appropriate deregulated price allowed by the contract. For example, if a contract merely states that a producer can collect the "highest regulated price" for deregulated gas, the parties may disagree as to what that price is. These types of contract disputes should generally be resolved by the parties or the appropriate judicial forum. *See generally, Pennzoil Co.* v. *FERC*, 645 F.2d 360, 380-82 (5th Cir. 1981). The Commission nonetheless invites comments on whether this is the most appropriate procedure for resolving these disputes.

D. Contracts Under Section 105

1. Definition of Indefinite Price Escalator Clauses

As noted above, section 121 deregulates the price of intrastate contracts where the price paid on December 31, 1984, is higher than $1.00 per MMBtu provided that the price has not been established under an indefinite price escator clause as defined in section 105(b)(3)(B). Th[u]s, sales of gas under section 105 will be deregulated only if the price paid exceeds $1.00 on December 31, 1984, without the effect of an indefinite price escalator clause, but will not be deregulated if it exceeds $1.00 by virtue of the operation of an indefinite price escalator clause.

First, section 105(b)(3)(B) defines an indefinite price escalator clause as a clause

> which provides for the establishment or adjustment of the price for natural gas delivered under such contract by reference to other prices for natural gas, for crude oil, or for refined petroleum products; or . . . which allows for the establishment or adjustment of the price of natural gas delivered under such contract by negotiation between the parties.

In its Order No. 23 series,[7] the Commission found in general that for interstate contracts, most-favored-nations

[7] Final Regulations Amending and Clarifying Regulations Under the Natural Gas Act and the Natural Gas Policy Act, 44 FR 16895

clauses, price-reference clauses, certain redetermination clauses, FPC clauses, area rate clauses, and other such clauses are indefinite price escalator clauses.[8] The Commission believes that these findings are consistent with the definition of indefinite price escalator clauses in section 105(b)(3)(B) and should be used in applying that definition to intrastate contracts.

Second, while the Commission could rely on State or Federal courts to resolve contractual disputes as to whether a contract clause should be treated as an indefinite price escalator clause under section 105(b)(3)(B), the Commission requests comments on whether to allow the use of declaratory orders or NGPA interpretations of the General Counsel (18 CFR 385.207 and 385.1901 (1983)), or procedures similar to the Order No. 23 procedures to resolve such disputes. Since declaratory orders offer the parties the opportunity to obtain a binding resolution before the Commission, the Commission is proposing to specifically provide in § 271.506(a) that a petition for declaratory order be filed in instances where there is a conflict as to whether a contract clause meets the definition in NGPA section 105(b)(3)(B). While the Commission is inclined to exercise its own authority for purposes of determining what constitutes an indefinite price escalator clause and whether the gas subject to such a contract is deregulated, the Commission is inclined to

(Mar. 20, 1979) (Order No. 23); 44 FR 34472 (June 15, 1979) (Order No. 23-B) (codified at 18 CFR § 154.94 (h) through (j) (1983)).

[8] In Order No. 23, the Commission was concerned with the issue of whether various contractual clauses provided contractual authority to collect NGPA maximum lawful prices. Here, however, the Commission is concerned not so much with interpreting the intent of parties to contracts but with whether certain pricing clauses fall within the definition of "indefinite price escalator clause."

leave other aspects of a contract's dispute (such as the price that can be charged under the contract) to be resolved by the parties or appropriate judicial forum.

2. Operation of the $1.00 per MMBtu Threshold

Other problems arise in determining whether the gas is actually priced above $1.00 on December 31, 1984. For example, some contracts may contain a definite pricing term which sets the price above $1.00 per MMBtu, without resorting to any indefinite price escalator clause that may also be in the contract. Thus, if the contract includes a definite price term setting the price at $1.10 per MMBtu and also an indefinite price escalator clause, the question arises as to whether the gas is deregulated, especially if the producer has used the indefinite clause to collect the section 102 price under the authority of section 105(b)(1).

The Commission believes that section 105(b)(3)(A) requires that the operation of the indefinite price escalator clause be the only mechanism by which the price is raised above $1.00 per MMBtu on December 31, 1984. Thus, in the above example, the gas would be deregulated. If Congress intended otherwise, it could have stated that all intrastate contracts with indefinite price escalator clauses remain regulated; there would be no need to reference the $1.00 threshold. Thus, the Commission is proposing in new § 271.506(b) that a contract will be deregulated if the fixed price that was or would have been collected under the contract is more than $1.00 per MMBtu.

A related problem arises when the price paid under an intrastate contract is based on a percentage of the proceeds from a subsequent sale (percentage sale). Determining whether the percentage sale price is above $1.00 per MMBtu on December 31, 1984, obviously presents the problem of determining a specific price paid on December 31, 1984. If conceived of as a daily price, a percentage sale price can fluctuate on a daily basis. For example, under a

percentage sale, the price of gas, if reported on a daily basis, may be above $1.00 on December 28, below a $1.00 on January 1, 1985, and above $1.00 again on January 3, 1985.

The Commission faced a similar problem in Order No. 68,[9] in which the Commission had to determine whether a percentage sale exceeded the section 105 and 106(b) ceiling price. The Commission noted that "the pricing mechanisms under sections 105 and 106(b) appear to assume a specific price stipulated by the terms of the contract." That order resolved this dilemma by reference to the subsequent resale between the percentage sale buyer and subsequent purchaser (resale contract). If the resale contract was within the ceiling price authorized by the NGPA, then the Commission assumed that the price paid under the percentage sale was within the ceiling price of the NGPA. The Commission noted that this was "the only practical course."

For purposes of determining whether section 105 gas subject to percentage sales contracts is priced above $1.00 per MMBtu and thereby deregulated, the Commission is proposing to follow the same rule established in Order No. 68. As proposed in § 271.506(c), if a resale contract that is the subject of a prior percentage sale is above $1.00 per MMBtu, the Commission will deem the percentage sale deregulated by operation of section 121. Conversely, if the price paid under the resale contract is below $1.00 per MMBtu on December 31, 1984, then the Commission will deem the percentage sale not deregulated by operation of section 121.

The Commission recognizes that under this proposal, there may be certain instances where the price paid under the resale contract is over $1.00 per MMBtu and the percentage given to the seller is less than $1.00 per MMBtu,

[9] Rules Generally Applicable to Regulated Sales of Natural Gas and Ceiling Prices, 45 FR 5678 (Jan. 24, 1980) (Order No. 68).

and thus not technically eligible for price decontrol. The Commission believes that this problem is *de minimis*. Under section 105, the ceiling price for a percentage sale that remains regulated is the section 102 price ($3.73 – July 1984). The Commission believes that given the current surplus market, there will be few instances in which the price collected for a percentage sale of deregulated gas would exceed or equal the section 102 price. Thus, it makes little practical difference whether the Commission considers these percentage sales regulated or deregulated sales. Also, a decision to deregulate the percentage sale contract will have no rate impact on consumers since the resale contract will qualify for a deregulated price. The Commission is, therefore, inclined to follow Order No. 68's resolution of the percentage sale problem.

Alternatively, the Commission recognizes that it could require parties to percentage sale contracts to determine as closely as possible whether the price actually paid on December 31, 1984, is above or below $1.00 per MMBtu. The Commission is concerned that this option would entail considerable accounting and administrative burden to the parties and this Commission. However, the Commission requests comments on the proposal and this alternative as well as other administratively feasible techniques for determining whether a percentage sale exceeds the $1.00 per MMBtu threshold mandated in section 105 of the NGPA.

E. Other issues and conforming amendments

The Commission has indicated above those issues that it must resolve that relate to deregulation or new ceiling prices of certain gas in 1985. The Commission, however, wishes to be apprised of any other issues that commenters are aware of that will be presented by pending deregulation.

Many technical, conforming amendments must be made to the Commission's regulations implementing the NGPA in light of the changes that will be made under the NGPA on January 1, 1985. For example, the Commission's regulations relating to deregulated gas are codified in Part 272 and the regulations relating to regulated gas in Part 271. Since the price of gas subject to sections 102 and 103 is currently regulated, the regulations for these sections are contained in Part 271. Since most of the gas subject to these sections will be deregulated in 1985, the Commission has the choice of either amending Part 271 to reflect deregulation changes, or including in Part 272 the regulations that will apply to the deregulated gas under sections 102 and 103.

The Commission also has included technical and conforming changes that must be made to its NGPA regulations in the regulatory text of this proposal. For example, the table of ceiling prices listed at the end of § 271.101 is amended to reflect the new ceiling prices for sections 103 and 105 gas that remains regulated. While the Commission believes it has covered substantially all changes that must be made, it encourages comments on additional issues, and technical and conforming amendments in light of the changes that will be made by the NGPA in January of 1985.

III. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires certain statements, descriptions, and analyses of proposed rules that will have a "significant economic impact on a substantial number of small entities."[10] The Commission is not required to make such an analysis if it certifies that a proposed rule will not have a "significant economic impact on a substantial number of small entities."[11]

[10] 5 U.S.C. 603(a) (1982).

[11] *Id.* at section 605(b).

There are approximately 10,000 natural gas producers in the United States, many of which would be classified as small entities under the appropriate RFA definition.[12] This proposed rule might affect most of these entities by amending the filing requirements that must be followed for gas that will be deregulated on January 1, 1985. While these changes will be important in implementing deregulation under the Natural Gas Policy Act, the Commission does not believe that the burden imposed by these regulations will be significant. For the most part these regulations would merely make legal decisions and technical corrections necessary to implementing the statute. In those few instances were the Commission proposes to amend its regulations based on policy, the Commission believes that the economic impact, if any, will not be "significant." Accordingly, the Commission certifies that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

IV. Comment Procedures

The Commission invites interested persons to submit written comments, data, views, and other information concerning the matters set out in this notice. An original and 14 copies of such comments should be filed with the Commission by October 17, 1984. Comments should be submitted to the Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426 and should refer to Docket No. RM84-14-000. All written submissions will be placed in the Commission's public files and will be available for public inspection in the Commission's Office of Public

[12] *Id.* at section 601(3) *citing to* section 3 of the Small Business Act, 15 U.S.C. 632 (1982). Section 3 of the Small Business Act defines small business concern as a business which is independently owned and operated and which is not dominant in its field of operation.

Information, Room 1000, 825 North Capitol Street, NE., Washington, D.C. 20426, during regular business hours.

In addition, pursuant to section 502(b) of the NGPA, the Commission will hold a public hearing on October 11, 1984, at 10:00 a.m. Requests for participation in this hearing must be submitted by October 4, 1984. Requests should indicate the amount of time required for the oral presentation. Persons participating should, if possible, bring 25 copies of their presentation to the hearing.

This hearing will not be of a judicial or evidentiary type. There will be no cross-examination of persons presenting statements. However, the panel may question such persons and any interested person may submit questions to the presiding officer to be asked or persons making statements. The presiding officer will determine whether the question is relevant and whether the time limitations permit it to be presented. Any further procedural rules will be announced by the presiding officer at the hearing. Transcripts of the hearing will be available in the public file for this proceeding, Docket No. RM84-14-000, in the Commission's Division of Public Information.

List of Subjects in 18 CFR Parts 270 through 274

Natural gas, Incentive prices.

In consideration of the foregoing, the Commission proposes to amend Parts 270 through 274, Subchapter H, Chapter 1, Title 18 Code of Federal Regulation.

By direction of the Commission.

Kenneth F. Plumb
Secretary

PART 270—[AMENDED]

1. The authority citation for Part 270 is revised to read as follows:

Authority: Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432.

2. Section 270.101(a) is amended by removing the words "high-cost" and inserting, in their place, the word "natural."

3. Section 270.101(c)(2) is revised to read as follows:

§ 270.101 Application of ceiling prices to first sales of natural gas.

* * * * *

(c) * * *

(2) The price of gas is deregulated only if such gas is deregulated natural gas as defined in § 272.103(a).

* * * * *

§ 270.102 [Amended]

4. Section 270.102(b)(14) is amended by removing the words "high-cost" and inserting, in their place, the word "natural."

5. A new § 270.208 is added to read as follows:

§ 270.208 Applicability of section 121.

Natural gas that is subject to section 121(a) of the NGPA shall be price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

PART 271—[AMENDED]

6. The authority citation for Part 271 is revised to read as follows:

Authority: Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432.

7. Table I following § 271.101 is amended by adding a sentence at the end of footnote 1, adding footnotes 4, 5, and 6, adding a new designation E between designations C and F in the column reading "Subpart of Part 271" and revising designations B and C to read as follows:

§ 271.101 Ceiling prices for certain categories of natural gas.

* * * * *

TABLE I—NATURAL GAS CEILING PRICES (OTHER THAN NGPA §§ 104 AND 106(a))

Subpart of part 271	NGPA section	Category of gas	*Maximum lawful price per MMBtu for deliveries in*
B	102	New natural gas, certain OCS gas[4]	* * *
C	103	New, onshore production wells[5]	* * *
E	105(b)(3) .	Existing intrastate contracts[6]	

* * * * *

[1] * * * Commencing January 1, 1985, the price of some intrastate rollover gas is deregulated. (See Part 272 of the Commission's Regulations.)

* * * * *

[4] Commencing January 1, 1985, the price of natural gas finally determined to be eligible as new natural gas under section 102(c) is deregulated. (See Part 272 of the Commission's Regulations.)

[5] Commencing January 1, 1985, the price of some natural gas finally determined to be eligible as natural gas produced from a new, onshore production well under section 103 is deregulated. (See part 272 of the Commission's Regulations.)

[6] Prior to January 1, 1985, the maximum lawful price was the price specified in Subpart B of Part 271.

8. Section 271.201(a) is revised and the introduction text of the section is reprinted for the convenience of the reader:

§ 271.201 Applicability.

This subpart implements section 102 of the NGPA and applies to the first sale of:

(a) new natural gas which is not deregulated natural gas (see § 272.103(a)); or

* * * * *

9. Section 271.301 is revised to read as follows:

§ 271.301 Applicability.

This subpart implements section 103 of the NGPA and applies to the first sale of natural gas produced from a new, onshore production well, if such gas is not deregulated natural gas (see § 272.103(a)).

10. Section 271.501 is amended by revising the first sentence to read as follows:

§ 271.501 Applicability.

This subpart implements section 105 of the NGPA and applies to the first sale of natural gas under an existing intrastate contract or under a successor to a intrastate contract, if such natural gas is not deregulated natural gas (see § 272.103(a)). * * *

11. Section 271.502(a) is amended by removing the heading "November 9, 1978, contract price at or below \$2.06 per MMBtu."

12. Section 271.502 is amended by removing the heading for paragraph (b), revising the introductory text of paragraph (b) and paragraph (b)(1) to read as follows:

§ 271.502 Maximum lawful prices.

* * * * *

(b) In the case of a first sale of natural gas to which this subpart applies and for which the price paid exceeds $1.00 per MMBtu on December 31, 1984 (or would exceed $1.00 per MMBtu if sold on such date) solely by operation of an indefinite escalator clause, the maximum lawful price for natural gas delivered in any month shall be the higher of:

(1) the maximum lawful price per MMBtu for such month specified for Subpart E of Part 271 in Table I of § 271.101(a); or

* * * * *

13. A new § 271.506 is added to read as follows:

§ 271.506 Rules related to deregulation of intrastate gas.

(a) *Indefinite price escalator clauses.* In any case where there is a controversy over whether a particular contract clause is an indefinite price escalator clause under section 105(b)(3)(B), a petition for a declaratory order under § 385.207 of the Commission's regulations shall be filed.

(b) *Contracts over $1.00 by virtue of a definite price clause.* The price of natural gas subject to this subpart is deregulated if the price paid under a clause other than an indefinite price escalator clause is higher than $1.00 per MMBtu for the last deliveries of such gas occurring on December 31, 1984, or if no deliveries occurred on such date, the price that would have been paid had deliveries occurred on such date.

(c) *Percentage-of-proceeds sales.* The price of natural gas sold under a percentage-of-proceeds contract subject to this subpart is deregulated if the price paid on the resale contract is deregulated under Part 272. (§ 270.202(b) states other rules for percentage-of-proceeds sales.)

14. Section 271.601 is revised to read as follows:

§ 271.601 Applicability.

This subpart implements section 106(b) of the NGPA and applies to the first sale of natural gas under an intrastate rollover contract, if such natural gas is not deregulated natural gas (see § 272.103(a)).

PART 272—[AMENDED]

15. The authority citation for Part 272 reads as follows:

Authority: Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432.

§§ 272.101 and 272.102 [Amended]

16. Sections 272.101 and 272.102 are amended by removing the words "high-costs" and inserting, in their place, the word "natural."

17. In § 272.103, paragraph (a) is revised to read as follows:

§ 272.103 Definitions.

(a) "Deregulated natural gas" means:

(1) Natural gas for which a jurisdictional agency determination has become final under Parts 274 and 275 that the gas qualifies as:

(i) deep, high-cost natural gas;

(ii) gas produced from geopressured brine;

(iii) occluded natural gas produced from coal seams; or

(iv) gas produced from Devonian shale.

(2) Natural gas for which a jurisdictional agency determination becomes final under Parts 274 and 275 and which is sold in a first sale on or after January 1, 1985, and such gas qualifies as:

(i) new natural gas as defined in § 271.203;

(ii) natural gas produced from any new, onshore production well if such gas as defined in § 271.303:

(A) was not committed or dedicated to interstate commerce (as defined in NGPA section 2(18)) on April 20, 1977; and

(B) is produced from a completion location which is located at a depth of more than 5,000 feet.

(3) Natural gas sold under an existing intrastate contract, any successor to an existing contract or any rollover contract, if:

(i) such natural gas was not committed or dedicated to any interstate commerce on November 8, 1978; and

(ii) the price paid under a clause other than an indefinite price escalator clause for the last deliveries of such natural gas occurring on December 31, 1984, or, if no deliveries occurred on such date, the price that would have been paid had deliveries occurred on such date is higher than $1.00 per MMBtu.

* * * * *

18. Section 272.104 is revised to read as follows:

§ 272.104 Special rules for measuring the depth of deregulated natural gas.

For purposes of determining the depth of a completion location under §§ 272.103(a)(2)(ii)(B) and 272.103(b), measurement shall be the true vertical depth from the surface location to the highest perforation point in the completion location.

PART 273—[AMENDED]

19. The authority citation for Part 273 is revised to read as follows:

Authority: Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432.

20. Section 273.202(a)(2) is revised to read as follows:

§ 273.202 Collection pending jurisdictional agency determination of eligibility.

(a) * * *

(2) If an application has been filed with the jurisdictional agency for a determination of elibility under Part 272 (relating to deregulated natural gas), the deregulated price may be charged pending the jurisdictional agency determination.

* * * * *

21. Section 273.203(a)(2) is revised to read as follows:

§ 273.203 Collection pending review of jurisdictional agency determination.

(a) * * *

(2) If a jurisdictional agency has determined in accordance with Part 274 that natural gas qualifies under Part 272 (relating to deregulated natural gas), the seller may charge and collect the deregulated price during the period described in paragraph (b) of this section.

* * * * *

22. In § 273.204, a new paragraph (a)(1)(iv) is added to read as follows:

§ 273.204 Retroactive collection after final determination.

(a) * * *

(1) * * *

(iv) in the case of a new natural gas (as defined in § 271.203) and natural gas produced from a new, onshore production well (as defined in § 271.303) which also satisfies the criteria of § 272.103(a)(3), if the application for determination was filed on or before January 1, 1985, then for the first sales of such natural gas delivered on or after January 1, 1985, the seller may retroactively collect

the amount by which the deregulated price exceeds the price collected during such period.

* * * * *

§ 273.204 [Amended]

23. Section 273.204(a)(2) is amended by removing the words "Part 272" and inserting, in their place, the words "§ 272.103.103(a)(1)."

PART 274—[AMENDED]

24. The authority citation for Part 274 is revised to read as follows:

Authority: Natural Gas Policy Act of 1978, 15 U.S.C. 3301-34342; Department of Energy Organization Act, 42 U.S.C. 7101-7352.

25. Section 274.101 is amended by revising the introductory language to read as follows:

§ 274.101 Applicability.

This part applies to determinations of jurisdictional agencies (as defined in § 274.501) made under § 272.103(a)(1) and the following subparts of Part 271:

* * * * *

APPENDIX E

Federal Energy Regulatory Commission

18 CFR Parts 270, 271, 272, 273, and 274

[Docket No. RM84-14-000; Order No. 406]

Deregulation and Other Pricing Changes on January 1, 1985, Under the Natural Gas Policy Act

Issued: November 16, 1984.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rule.

SUMMARY: On January 1, 1985, the Natural Gas Policy Act of 1978 (NGPA) will deregulate the prices for substantial amounts of interstate and intrastate gas. The Federal Energy Regulatory Commission (Commission) is amending its regulations to prepare for price deregulation under section 121 of the NGPA for certain types of natural gas subject to sections 102, 103, 105, and 106, and is publishing new maximum lawful prices under sections 103(b) and 105(b)(3).

EFFECTIVE DATE: January 1, 1985.

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SUPPLEMENTARY INFORMATION:

Before the Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A.G. Sousa, Oliver G. Richard III, and Charles G. Stalon.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is issuing a final rule implementing section 121 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301-3432 (1982). On January 1, 1985, NGPA section 121 will deregulate the prices for substantial amounts of interstate and intrastate gas.

In general, this final rule states: (1) That jurisdictional agency determinations are still necessary for section 102 and section 103 gas after January 1, 1985; (2) that first sellers may make interim collections at the agreed to deregulated price; (3) that gas which qualifies for both a regulated and a deregulated category will be deregulated; (4) that contract prices for intrastate contracts above $1.00 per MMBtu by virtue of a definite price clause will be deregulated.

II. Background

At the time Congress was considering the NGPA, oil prices were rising and increasing demand and declining supplies of natural gas created severe shortages in many parts of the nation. Political concern about these market distortions, as well as concern about the nation's energy dependence, led Congress to enact legislation revamping the natural gas pricing structure that had existed under the Natural Gas Act (NGA), 15 U.S.C. section 717-717w (1982), and eventually to phase in market forces as a substitute for that structure for a substantial amount of our nation's gas supplies. Thus, in 1978, Congress deregulated some gas shortly after the enactment of the NGPA, provided for deregulation of prices for other categories of gas over the next decade, and retained regulatory and pricing controls on other gas wells until these wells are depleted.

Title I of the NGPA created several categories of natural gas, the first sale of which is subject to maximum

lawful prices (ceiling prices). Those categories are based on a variety of factors, such as the date the well was drilled, whether the gas was sold under intrastate contracts or committed or dedicated to interstate commerce (dedicated gas), and the need for incentives to produce gas that is otherwise difficult or uneconomical to produce. In contrast, the price of certain natural gas produced from completion locations deeper than 15,000 feet, geopressured brine, coal seams, or Devonian shale was deregulated in 1979, shortly after enactment of the NGPA. Moreover, under section 121, the price for section 102(c) and some section 103 gas and certain intrastate gas will be deregulated on January 1, 1985, while additional section 103 gas will be deregulated on July 1, 1987. In addition to price deregulation, Congress also mandated higher ceiling prices on January 1, 1985, for certain categories of gas under sections 103 and 105. Since the enactment of the NGPA, many changes have occurred in the natural gas markets. One development, unforeseen by the drafters of the NGPA, is the current supply surplus of natural gas, however temporary or long-lived it may prove to be. This oversupply factor is an important consideration in understanding the controvery surrounding "dually qualified" wells, as discussed below.

In general, this rulemaking concerns categories of natural gas that will be price deregulated under section 121. On January 1, 1985, section 121(a) eliminates price controls from "new natural gas" defined in section 102(c)[1] and certain gas produced from "new, onshore production

[1] "New natural gas" under section 102(c) covers three types of gas: (1) gas produced from the Outer Continental Shelf under a lease entered into on or after April 20, 1977; (2) gas produced from an onshore well on which surface drilling began on or after February 19, 1977, or the depth was increased by 1,000 feet on or after that date, and which is at least 2.5 miles from the nearest marker well or which is 1,000 feet deeper than the deepest completion location of any marker well within 2.5 miles; and (3) gas produced from a reservoir from

wells" under section 103.[2] Except for gas that is subject to section 121(e), section 121 also deregulates the price of intrastate gas that is categorized as section 105 or 106(b) gas, if the price paid for the last deliveries of such natural gas occurring on December 31, 1984 (or the price that would have been paid if no deliveries occurred on that date), is higher than $1.00 per MMBtu.[3]

The Commission has two goals in this rulemaking. The first is to resolve those legal and policy issues that are presented by deregulation of certain categories of gas under section 121. The second task is to make technical amendments to the Commission's NGPA regulations to conform them to the pricing changes that will take effect on January 1, 1985.

On September 13, 1984, the Commission proposed to amend its regulations to prepare for price deregulation under section 121 of the NGPA for certain types of natural gas subject to sections 102, 103, 105, and 106 and to publish new maximum lawful prices under sections 103(b) and 105(b)(3).[4]

The Commission received approximately 100 substantive comments to this rulemaking—45% representing producer interests, 25% representing pipeline interests and

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which natural gas was not produced in commercial quantities before April 20, 1977, subject to certain exclusions.

[2] "New, onshore production wells" under section 103(c) are onshore wells on which surface drilling began on or after February 19, 1977, and from which gas is produced from a proration unit that meets certain requirements. Section 121 deregulates on January 1, 1985, the price of section 103 wells that were not committed or dedicated to interstate commerce on April 20, 1977, and that produce gas from a completion location deeper than 5,000 feet.

[3] *See* Section 121(e).

[4] Notice of Proposed Rulemaking, 49 FR 36399 (Sept. 17, 1984) (Docket No. RM84-14-000).

30% from utilities, local distribution companies, and consumer groups. Numerous personal letters from royalty owners, investors, and other individuals were received.

III. Discussion

A. *Jurisdictional Agency Determinations*

Section 503 established procedures under which well category determinations are made by State or Federal jurisdictional agencies and then reviewed by this Commission. Since enactment of the NGPA, this section and the Commission's implementing regulations have been used primarily for determining whether gas qualifies under a particular NGPA pricing category.

The Commission's proposal discussed several circumstances in which it must decide if section 503 determinations would be required after several categories of gas are deregulated after January 1, 1985. Even though section 121 deregulates the price of certain categories of gas, the NGPA requires first sellers to continue to file for determinations for certain categories of gas that will be price deregulated after the determination becomes final, where determinations previously have been required under Title I.

1. Determinations for Gas That Will Be Deregulated

For sections 102 and 103 gas deregulated by section 121 and for which a producer has not filed for or obtained a determination prior to January 1, 1985, first sellers must continue to file applications for determinations with the appropriate jurisdictional agencies. The Commission proposed that the NGPA requires a determination in this instance. The vast majority of commenters supported the Commission's reading of the NGPA, but requested that the Commission simplify its section 503 filing requirements.

Under the determination process Congress established in section 503, jurisdictional agencies make certain factual findings about the well characteristics for certain categories of gas in Subtitle A of Title I of that Act. Subject to certain interim collection procedures in section 503(e), an affirmative determination by the jurisdictional agency is a condition precedent to a first seller charging and collecting a specified price. Section 503 does not distinguish between gas that is regulated or deregulated, but attaches a substantive effect to a jurisdictional agency's application of the definitions in sections 102(c), 102(d), 103(c), 107(c) and 108(b). Nothing in sections 503 or 121 indicates that Congress intended this substantive effect to be changed by deregulation on January 1, 1985. Thus, the Commission believes that the NGPA requires producers to obtain well category determinations, even for gas which will be price deregulated after a final determination.

As we noted in the proposal, the Commission's approach to deregulation under section 107 followed this view. Under section 107(c)(1)-(4), Congress deregulated the price of certain types of high-cost natural gas, *i.e.*, gas produced from completions below 15,000 feet, Devonian shale, geopressured brine, and occluded natural gas produced from coal seams. Section 503(a)(1) requires that a determination be made "applying the definition of high-cost natural gas under section 107(c)." Similarly, section 107(c) requires that gas must be "determined in accordance with section 503 to be" high-cost gas. Given this NGPA mandate, the Commission required that producers obtain a determination in order for gas to be deregulated under section 107(c). This rule would adopt similar requirements for gas under sections 102(c) and 103 that will be deregulated on January 1, 1985.

With regard to commenter's suggestions that the Commission simplify its section 503 filing requirements, the

Commission notes that it recently completed a rulemaking which substantially reduced the burden imposed in filing for determinations.[5]

Furthermore, because some jurisdictional agencies require certain filing requirements in addition to those required by the Commission, the Commission urges jurisdictional agencies to consider streamlining their filing requirements for section 102 and section 103 final determinations by reducing them to the minimum required by the Commission. The jurisdictional agencies must give written notice of any change in its procedures as described in § 274.105(b). Jurisdictional agencies might also consider filing an alternative plan with the Commission under § 274.207 to further decrease the burdensome filings and thereby streamline the section 102 and section 103 determination process. However, these alternative plans must satisfy the section 503 statutory requirement for substantial evidence.

2. Gas for Which Determinations Have Already Been Received

The Commission proposed that, if a producer has already obtained a determination prior to January 1, 1985, that the gas qualifies as section 102(c) or 103 gas, no additional determination that the gas is deregulated is required by the NGPA. Hence, the price for all section 102(c) or 103 gas that otherwise meets the prerequisites for deregulation is deregulated on January 1, 1985. Commenters supported this view. Under this approach, producers would determine whether the gas meets any additional criteria for deregulation under section 121 of the NGPA. The commission expects that pipelines will

[5] Reduction in Filing Requirements for Well Category Applications Under Sections 102, 103, 107 and 108 of the Natural Gas Policy Act of 1978, 48 FR 44508 (Sept. 29, 1983) (Order No. 336); 49 FR 566 (Jan. 5, 1984) (Order on Rehearing).

monitor a producer's decision as to whether or not the gas is deregulated. The Commission intends to review these decisions with audits and investigation of complaints.

The Commission requested comment on whether additional filing requirements were necessary for section 103 gas that had already received a determination. Section 103 gas must meet two criteria to be deregulated. It must not have been committed or dedicated to interstate commerce on April 20, 1977,[6] and it must be produced from a completion location deeper than 5,000 feet.[7] The Commission

[6] For purposes of determining whether the gas was committed or dedicated to interstate commerce on April 20, 1977, the Commission intends to apply the definition in section 2(18) of the NGPA. Under the NGA, acreage subject to an interstate contract was not dedicated gas until gas actually commenced flowing in interstate commerce. Conversely, if no gas under the contracts actually flowed in interstate commerce, then the gas was not dedicated gas under the NGA. Under section 2(18) of the NGPA, however, gas may be committed or dedicated to interstate commerce before flowing in interstate commerce, if, when sold, it "would be required to be sold in interstate commerce . . . under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act." *See* generally, Conoco, Inc. v. FERC, 622 F.2d 796 (5th Cir. 1980); Tenneco Exploration Ltd. v. FERC, 649 F.2d 376 (5th Cir. 1981). Hence, gas which, if sold, would have been required to be sold in interstate commerce under the terms of any contract, Natural Gas Act (NGA) certificate, or provision of such Act would be deemed committed or dedicated to interstate commerce on April 20, 1977. With regard to infill wells, if the entire acreage comprising the proration unit is dedicated, then subsequent infill wells could not qualify for the deregulated price.

[7] For purposes of determining whether the completion location is located at a depth of more than 5,000 feet, the Commission proposes to amend § 272.104 to apply to section 103 gas. Section 272.104 currently applies to section 107(c) high-cost natural gas which must, among other things, be produced from a completion location deeper than 15,000 feet and requires that the measurement "shall be the true vertical depth from the surface location to the highest perforation point of the completion location." 18 CFR 272.104 (1983). The Commission believes it is appropriate to use the same measurement definition for section 103 gas as for section 107(c) gas, as consistent with our current practice. No comments opposing this proposal were received.

requested comment on whether it has an obligation to review these deregulation criteria for section 103 gas before a first seller may charge and collect the deregulated price. The Commission considered requiring producers of such gas to file an affidavit, either separately or as part of a determination application, with the Commission and the purchasing pipeline that the section 103 gas meets these criteria. Alternatively, the Commission indicated that it might require a standard section 503 determination by jurisdictional agencies with review by this Commission prior to deregulation taking effect.

Commenters were overwhelmingly opposed to requiring any additional filing requirements for section 103 gas. These commenters supported the Commission's general approach of relying on pipelines to monitor these situations and to rely on audits and complaints. The Commission believes that it is not necessary to impose additional filing requirements at this time. These requirements would impose unnecessary burdens on applicants, jurisdictional agencies and this Commission in a situation where less burdensome alternatives exist for ensuring that the requirements of the NGPA will be adequately met.

Similarly, the Commission believes that post-January 1, 1985 section 103 determinations must receive treatment identical to that received by pre-January 1, 1985 section 103 determinations for deregulation. Therefore, all pending and prospective section 103 applications automatically deregulate once the section 103 determination is final, provided that the dedication and depth requirements are met. Neither an additional filing requirement such as an affidavit nor a second "deregulation" determination are necessary to implement the dedication and depth requirements in section 121.

Also, the Commission expects pipelines to monitor a producer's decision as to whether a well is deregulated. The Commission will review these decisions with audits

and investigation of complaints. Pipelines complained of the additional monitoring burden and the increased cost to the consumer. In order to minimize this potential burden, the Commission will require the producer to file an affidavit with the pipeline at the pipeline's request, presenting information on the dedication and depth of the well. As a result, the pipeline will not need to invest resources to obtain this information.

3. Pending Determinations

Where an application for a determination is pending before a jurisdictional agency or this Commission on January 1, 1985, and becomes final after January 1, 1985, the Commission proposed that the determination must become final before the gas qualifies for deregulation.[8] This follows from the Commission's proposal that producers should be required to obtain a determination even for gas that will be price deregulated after January 1, 1985.[9] Commenters supported this approach and it is adopted for the reasons stated above.

[8] Several commenters request clarification of whether the "effective date" of deregulation, for any well is the date on which it is determined to qualify for a deregulated category, the date for which such determination is filed or some other date. A multiplicity of dates for deregulation, depending on when the wells qualify for a deregulated category could make contract administration confusing. Just as the NGPA provided for section 107(c)(1-4) gas to be deregulated on November 1, 1979, the NGPA provides a date certain (January 1, 1985) for deregulation. Collection of the deregulated prices as of that date is, we emphasize, a matter of contract, however, subject to the need for a final determination (for section 102 and 103 gas) and the related dedication and depth requirements.

[9] Although somewhat unclear, some commenters appear to ask whether a producer that is charging the higher section 102(c) incentive price for gas that has also been eligible since 1979 for a lower deregulated price under section 107(c)(1-4), will be liable to refund the difference between the section 102(c) price and the otherwise applicable contract price for deregulated gas for past periods. In this

B. Interim Collection

The Commission's regulations state two different rules governing the price a first seller may collect while an application for a determination of the applicable category of gas is pending before the jurisdictional agency or this Commission. The first rule applies to gas that is subject to a ceiling price and for which a determination is required under the NGPA. In that situation, the Commission's current regulations allow producers, subject to contractual authorization, to collect the highest ceiling price for which they applied. 18 CFR 273.202(a)(1) and 273.203(a)(1) (1983). The second rule applies to gas that is deregulated under section 107(c)(1)-(4) and for which a determination is required. In that situation, the Commission's regulations allow a producer, subject to contractual authorization, to collect only up to the section 102 price, not a possibly higher deregulated price, while a determination is pending before a jurisdictional agency or this Commission. 18 CFR 273.202(a)(2) and 273.203(a)(2) (1983).

The Commission proposed several changes to its interim collection regulations in light of deregulation on January 1, 1985. First, the interim collection provisions of the regulations would be amended to apply not only to section 107(c)(1)-(4) gas, but also to sections 102(c) and 103 deregulated gas. Secondly, the Commission proposed to eliminate the section 102 price cap on interim collections and permit a producer to collect the price agreed upon by the parties while an application for a determination for such gas is pending before a jurisdictional agency or this Commission. This rule would apply both for applications pending on January 1, 1985, and for those filed after January 1, 1985. The deregulated price would be the price

situation, no actual violation of the NGPA maximum lawful price has occurred. However, there may be questions raised as to the price paid under the contract. Such contractual disputes should be resolved by the parties in the appropriate judicial forum.

that the producer and purchaser agree should be collected during the interim period, and thereafter, once the well finally qualifies for a deregulated category.

A relatively small number of commenters addressed this proposal. Commenters suggested that although producers file for the correct NGPA category 96% of the time, this still means an *incorrect* filing rate of 4%, which, in absolute dollar amount, can be substantial. Based on this observation, these commenters request that the section 102 price ceiling continue to be used as a price cap for interim collections either on public policy grounds that the "refund remedy" for incorrect category filings is not, as a practical matter, an adequate remedy, or on the theory that, if regulatory restraints are further lifted, as proposed, the error rate may far exceed the 4% error rate now prevailing. One commenter requested that the escrow and refund protections of interim collection (18 CFR 273.302 and 18 CFR 154.102(c) and (d), respectively), remain intact to protect pipelines and downstream customers from overcollection.

The rule adopted by the Commission extends interim collection procedures to sections 102(c) and 103 gas and removes the current price limitation in favor of whatever price the parties agree to. The Commission still believes that the new rule will not necessitate more refunds than under current regulations. If it is finally determined that the gas does not qualify under a deregulated section, however, the producer will be required to refund the difference between the price collected and the otherwise applicable ceiling price, with interest. 18 CFR 154.102(c) and (d) (1983). The Commission believes this refund remedy is adequate. As requested, all other aspects of the Commission's current interim collection regulations will remain in effect for such gas, such as the surety bond or escrow options.

One commenter made the point that the proposed rule sets the interim rate at the "contract rate" rather than limiting it to the section 102 ceiling rate. Other commenters asked that the Commission clarify whether the "contract rate" was intended to be the new interim rate, or whether a separate "agreed upon" interim rate was intended. The Commission emphasizes that it intends that, in the final rule, an agreed-upon rate will govern interim collections. However, if the parties are entitled to renegotiate the price upon deregulation, they need do so only once. The agreed-upon interim deregulated price may continue to serve as the deregulated price, once the gas is ultimately determined to be deregulated.

C. *Dual Qualification Gas*

Some gas qualifies for two NGPA categories: one regulated under a maximum lawful price and one which will be deregulated on January 1, 1985. Examples of this dually qualified gas are new tight formation gas (section 107(c)(5)) which also qualifies as section 102 or section 103 gas in order to receive the incentive price and some stripper well gas (section 108) which also qualifies as section 102 or section 103 or section 105 deregulated gas. Many contracts contain two clauses—one which sets the price if gas is regulated and one which is implemented if gas is deregulated. Producers would prefer to collect under the regulated category if the regulated price is higher than the deregulated price. Pipeline purchasers, on the other hand, want to renegotiate the gas price to arrive at a deregulated price which they believe will be lower than the regulated rate. By choosing to remain regulated, the producer may avoid renegotiation and the potential lowering of its contract price under current market conditions. And, in turn, the pipeline may be thwarted in renegotiating a new contract price.

The Commission proposed that gas that qualified for both a regulated and a deregulated category will be considered deregulated and the price would be collected under the clause of the contract governing deregulated gas. The Commission believed that Congress intended all price controls for gas specified in section 121 to terminate on January 1, 1985, whether or not the gas continued to qualify for a regulated price. This interpretation, the Commission noted, was consistent with the overall scheme envisioned by Congress when it enacted the NGPA – to provide incentive prices to encourage exploration and development of new reserves in the short-term, and to gradually substitute market forces for regulated prices by phasing in deregulation in 1985 and 1987.

Numerous comments were filed on this significant deregulation issue. Unlike comments filed by producers in previous years,[10] producer and royalty interest owner

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[10] Contrary to producers' current pro-regulation stance, they formerly argued for decontrol of tight formation gas on January 1, 1985, if such wells qualify. Numerous comments were filed by producers in Docket No RM79-76, Interim Rule Covering High-Cost Natural Gas Produced from Tight Formations, 45 FR 13414 (February 28, 1980). The following comment is typical of those presented by producers: "If a well qualifying as a 'tight' formation well also qualifies under section 102, then gas produced from that well will be price deregulated as of January 1, 1985. Similarly, if the Commission maintains its present requirement that any 'tight' formation well must also be a section 103 well, then gas from any such well *must* be price deregulated as of January 1, 1985, or July 1, 1987, depending on the depth of the well. Quite simply, the NGPA vests no discretion in the Commission in this regard. Thus, the fact that a well qualifies as a 'tight' formation well under any regulation ultimately issued has absolutely no impact upon the question of whether the gas produced from such well will otherwise be price deregulated pursuant to the provisions of Section 121 if it also qualifies under a deregulated category." Pennzoil Co. *et al.*, October 30, 1979, comments at 14, Docket No. RM79-76.

comments argued that the producer could choose to remain regulated under section 101(b)(5) and the NGPA does not require that this gas be deregulated. Many producers argue that they will be forced to shut in wells if these wells are deregulated because the prices will be uneconomic after renegotiation with pipelines. They argue that this would cause them severe economic hardship and would deprive the nation of needed gas reserves. Producers also argue that they would not have invested in tight formation wells (section 107(c)(5)) if they had known that this gas would be deregulated on January 1, 1985.

Comments from pipelines, gas associations, utilities and consumer groups supported the Commission's proposal, arguing that dually-qualified gas deregulated on January 1, 1985.

At the time the NGPA was crafted, it was assumed that the deregulated price would be equal to or exceed the otherwise applicable regulated maximum lawful prices. However, this probably will not be the case on January 1, 1985. Market prices are currently lower than the section 102 and section 103 ceiling prices. Admittedly, Congress may not have anticipated such a situation. It did, however, enact the NGPA in the belief that the marketplace could ascertain the value of a commodity in relation to supply and demand and allocate gas resources better than the regulated environment. Deregulation will accelerate the market trend to competitive affordable gas prices.

1. Section 121 Mandates Deregulation

The Commission believes that the position it took in its proposal is legally correct. Gas that is dually qualifed must be considered deregulated under the NGPA. The Commission believes that it is implementing Congress' intention to phase in deregulation of natural gas. Section 121 states that all maximum lawful prices for certain categories of natural gas, namely gas under sections 102(c) and 103(c),

"shall * * * cease to apply effective January 1, 1985 * * *." Therefore, gas that qualifies both under section 107(c)(5) or 108 *and* sections 102 or 103 will be deregulated, provided that section 103 gas meets the dedication and depth requirements. Deregulation appears to be mandatory. Producers cannot opt out of the statutory scheme on January 1, 1985, merely because market conditions are unfavorable. The Commission finds more persuasive the comments filed by producers on this issue in previous proceedings, where they too perceived a statutory mandate to deregulate.[11]

To ignore this fact invalidates the Congressional intent evident in the NGPA scheme of phased decontrol. The NGPA was created to phase from regulated ceiling prices in the short term to market clearing prices in the long term. Producers complain because market prices are currently lower than regulated prices. Under deregulation, the ability to negotiate a contract above the old regulated ceiling price is always possible.

With a different future market in mind, Congress allowed dual determinations to expedite the determination process and to prepare for the deregulation process. Quoting from the *Congressional Record*, October 14, 1978, H 13115-17:

> Another way in which dual determination requests could be appropriate would be in cases in which one determination would yield a short term benefit, while another a long term advantage. Such could be the case where a new well produces new gas and also qualifies as a stripper well. A single proceeding to determine qualification for both designations would permit the producer to obtain stripper well pricing under section 108 prior to January 1, 1985 and

[11] See, n.10, *supra*.

> deregulation as new gas thereafter. In the long run a single state proceeding might present less administrative burdens than a subsequent proceeding in which a classification not previously requested is sought.

It is our statutory obligation to interpret and implement the NGPA. It is our belief that the statutory intent to deregulate takes precedence over the statute's increased supply objective. Thus when the deregulation date of January 1, 1985 is reached, section 121—being the last provision in point of arrangement (Subsection B), and detailing deregulation specifically—is the controlling section.[12] The maximum lawful ceiling prices for section 107(c)(5) and section 108 gas which also qualifies as section 102 or section 103 deregulated gas no longer exist. The statutory language mandates deregulation of gas qualifying for a regulated and deregulated category on January 1, 1985. It is this statutorily-mandated deregulation that may trigger the parties' contractual agreements, with subsequent economic consequences.[13]

[12] Basic rules of general statutory construction and interpretation state that (1) when a conflict in a statute exists, the last provision in point of arrangement [within the statute] must control; Lodge 1858, Am. Fed. of Gov't Emp. v. Webb, 580 F.2d 496 (D.C. Cir. 1978); (2) [s]pecific terms will prevail over the general [terms] in the same or another statute which otherwise might be controlling; Lodge 1858, supra, *quoting* Ginsberg & Sons v. Popkin, 285 U.S. 204; (3) all sections must be reconciled so as to produce a symmetrical whole. Federal Power Comm. v. Panhandle Eastern Pipeline Col., 337 U.S. 498 (1949).

[13] Some producers raised an issue concerning the tax credit election available for tight formation wells under the Crude Oil Windfall Profits Tax Act, sections 231(a) and (b). These provisions have been cited in support of the proposition that tight formation gas was intended by Congress to be forever regulated, even if dually-classified as section

2. The Effect of Section 101(b)(5)

The Commission believes that section 101(b)(5) is helpful, but not dispositive of the dual qualification issue. Section 101(b)(5) states:

> If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

The Commission's proposal in this docket requested "comments on whether conflicts between regulated and deregulated gas prices are governed by this section * * *."

As early as 1979, in comments filed under Docket No. RM79-76, the producers interpreted the language to "compel" deregulation.[14] Producers now contend that section 101(b)(5) only refers to the ability of first sellers to collect the higher regulated prices. However, other commenters argued that the words "the provision which *could* result in

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102(c) or deregulated section 103 gas. An examination of the restrictions applicable to the use of this tax credit belies this interpretation, however.

Congress provided thus:

> (B) Special rules for gas from tight formations—
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> The term "gas produced from a tight formation" shall only include—
>
> (i) Gas the price of which is regulated by the United States, and
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> (ii) Gas for which the maximum lawful price applicable under the Natural Gas Policy Act of 1978 is at least 150 percent of the then applicable price under section 103 of such Act.

26 U.S.C. 29(c)(2)(B) [formerly 26 U.S.C. 44(D)(c)(2)(B).]

It is plain that the tax credit option was intended by Congress to be available only so long as the price of the gas "is regulated" [section (B)(i), above). Thus, Congress provided for removal of the tax credit when tight formation gas became deregulated, either as a result of dual classification, or otherwise.

[14] *See* n. 10, *supra*.

the highest price shall be applicable" mean that, if gas is eligible for both regulated and deregulated prices, there always exists at least the potential for the parties to negotiate a contract above the old regulated ceiling price. We agree.

Gas which qualifies for two different ceiling prices, or for a ceiling price and a deregulated price, would qualify for the highest applicable price. In this case, the deregulated price, which always *could* result in a price *higher* than a regulated price, prevails. Although we do not find section 101(b)(5) compelling on this issue, it clearly provides for automatic eligibility for the deregulated price, subject to the agreement of the parties. Much has been said about section 101(b)(5). This statutory section must be understood in the context of the contractual agreements that exist between the parties. However "could" is interpret, it may never operate to nullify the effectiveness of a contractual pricing right that is triggered by statutory deregulation.

3. Producers Claim of Reliance On the Incentive Prices

Some producers claim reliance on the incentive price in section 107(c)(5) and in section 108, and state that the Commission can not arbitrarily deny their ability to collect the incentive price. The Commission believes that this reliance is misplaced. It should have been clearly understood that the incentive price was to be statutorily removed by section 121 for section 102(c) and qualifying section 103 gas.

The Commission response to comments filed by producers in Docket No. RM79-76 put the producers on notice since February, 1980, when the interim rule on tight formations was issued, that tight formation section 107(c)(5) gas would deregulate if the gas also qualified as section 102(c) or section 103 gas. In the 1980 interim rule discussion on deregulation, the following was stated:

> The Commission was interested in soliciting comments as to whether section 101(b)(5) of the NGPA

requires the eventual deregulation of tight formation gas which also qualifies as section 103 gas the price for which is deregulated in 1985 or 1987 * * *. Those that responded to this request argued that section 101(b)(5) compels deregulation of tight formation gas when that gas is finally determined to qualify under a deregulated category. The Commission agrees and notes with regard to the change in the interim rule that this argument applies equally to new tight formation gas which qualifies under section 102(c).[15]

In light of the above discussion, the Commission believes that the producers' claim of reliance is unsubstantiated.

4. Economic Dislocation

The Commission is not insensitive to the economic dislocation which will be caused by deregulation of gas categories that are dually qualified. However, the mandate of the NGPA is clear. Gas which qualifies for a regulated and deregulated price, deregulates.

The Commission recognizes that deregulation will have an effect on the typical gas sales contract. First, the maximum lawful prices are *ceiling* prices only; contract prices may be lower than the ceiling price. Second, these regulated ceiling rates do not set the *floor* for deregulated prices. Third, many gas sales contracts contain a clause which requires the parties to renegotiate the sales contract if deregulation occurs. These deregulation clauses would allow market forces to reshape the contractual price terms upon deregulation.[16]

[15] *See* Interim Rule Covering High-Cost Natural Gas from Tight Formations. 45 FR 13414 (Feb. 28, 1980).

[16] *See*, DOE—EIA, Structure and Trends in Natural Gas Wellhead Contracts, November, 1983.

Once deregulation of section 102(c) and qualifying section 103 gas occurs, the contract between the parties must control. Many contract deregulation clauses appear to allow no choice—renegotiation will begin if deregulation occurs. This process is triggered by the *contract* and the NGPA's scheme of deregulation, not by this Commission's policy preferences. The Commission's implementation of the statute is not "forcing" renegotiation: rather, the renegotiation process occurs as a result of the deregulation language in the statute and the parties' own contracts. The Commission's authority to interpret contracts is limited by the decision in *Pennzoil Co.* v. *FERC.*[17] Indeed, section 101(b)(9) sets forth the effect of the contract, regardless of the statutorily imposed maximum lawful ceiling prices or exemptions from ceiling prices, *i.e.*, deregulated prices. In fact, the contract terms prevail. The statute in section 101(b)(9) states that such ceiling prices "shall not supersede or nullify the effectiveness of the price established under such contract."

Thus, any economic harm to producers flows from the NGPA and their contracts. This harm does not flow from this Commission's exercise of discretion in administratively deregulating gas. The Commission has no such authority. In this instance, our mandate is to determine Congress' intent with regard to the dual qualification problem.

5. Gas Qualifying as Section 107 Tight Formation Gas

In order to qualify as new tight-formation gas under section 107(c)(5), a producer must file the same information, in addition to other information, that would be filed

[17] 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982), "* * * FERC can no longer interpret or apply § 154.93 to these contracts. Whether such a contract authorizes escalation to NGPA prices is for state or federal courts to decide, unless the NGPA vested in FERC independent authority to interpret contracts concerning gas not within FERC's jurisdiction."

to qualify as a section 102 or 103 determination. 18 CFR 274.205(e)(1)(i)(A) or (B) and 271.703(b)(2)(a) (1983). Thus, a determination that gas qualifies as new tight-formation gas is implicitly a determination that the gas meets the qualifications for either section 102(c) or 103. Accordingly, for new tight formation gas for which a producer had received a final determination prior to January 1, 1985, the Commission proposed that such gas would be deregulated under section 121 if the application contained the data and met the requirements for section 102(c) or 103 gas.

Producers argue that tight formation gas is section 107(c)(5) gas, not section 102 or section 103 gas. The Commission does not agree. Such gas is obviously qualified for both categories. Meeting the statutory criteria of section 102 or section 103 is a prerequisite to qualification as new tight formation gas under section 107(c)(5). The Commission thus believes that determinations that gas qualifies under section 107(c)(5) new tight-formation gas should also be considered section 102 or 103 determinations, regardless of whether that was explicit at the time that the determination was made.[18]

D. Deregulation of Intrastate Gas

Section 121(a)(3) deregulates the price of intrastate contracts where the price paid on December 31, 1984, is higher than $1.00 per MMBtu. Section 121(e), however, imposes a new ceiling price[19] on existing or successor contracts but

[18] Gas covered by § 271.703(b)(3), recompletion tight formation gas, does not necessarily qualify under either section 102 or section 103. However, if a recompletion tight formation well, in addition to receiving a section 107(c)(5) determination, also has received either a section 102(c) or the appropriate section 103 determination, it would deregulate on January 1, 1985.

[19] The new ceiling price is established by section 105(b)(3)(B).

not rollover contracts,[20] otherwise deregulated by section 121(a)(3), if the price is established under an indefinite price escalator clause.

This complicated scheme of deregulation raised several issues on which the Commission made proposals, several on how to decide whether gas was priced over $1.00, and several relating to indefinite price escalator clauses.

1. Determining Whether the $1.00 Threshold Is Met

Sections 121 and 105 of the NGPA provide generally that intrastate gas, the price of which is greater than $1.00 per MMBtu on December 31, 1984, is deregulated, provided that the price has not been "established under" an indefinite price escalator clause (as defined in section 105). If the price is greater than $1.00 per MMBtu but is established under an indefinite price escalator, section 105(B)(3) of the NGPA imposes a price limit equivalent to the section 102 ceiling price with a slightly lower adjustment factor, in addition to inflation. In a sense, section 121 deregulates the whole universe of section 105 gas on January 1, 1985, and section 105(b)(3), at the same moment, re-regulates any such gas that was over $1.00 per MMBtu in price on the last day of this year pursuant to an indefinite price escalator (except for gas sold under "rollover" contracts).

The notice of proposed rulemaking (NOPR) stated that the section 121(e) and 105(b)(3)(A) limitation applied only to a situation where operation of an indefinite price escalator was necessary in order to exceed the $1.00 threshold. In a situation where an intrastate contract con-

[20] Various commenters argued that rollover contracts were never "reregulated" by section 121(e), contrary to inferences drawn from the Commission's proposal. The Commission did not intend to imply that rollovers would be reregulated and therefore agrees with these commenters.

tained both a fixed price term and an indefinite price term, and both were over $1.00 per MMBtu on January 1, 1985, the NOPR proposed that the section 105(b)(3)(A) limitation would *not* apply, even if the price on December 31, 1984 was determined pursuant to the indefinite price clause.[21]

Some commenters objected to this interpretation. On the other hand, many commenters supported the position put forth in the NOPR. After careful consideration of the comments on this subject, the Commission has determined to affirm the initial position and rationale on this issue set forth in the NOPR. There is a general lack of discussion in the legislative history on this precise point. However, the language of the statute, and the legislative history that does exist, appears to favor, on balance, the position enunciated in the NOPR. Accordingly, § 271.506(a) is being adopted as proposed.

2. Percentage of Proceeds Sales

A second situation in which it is unclear how to determine if the $1.00 threshold was met arose when the price paid under an intrastate contact is based on a percentage of the proceeds from a subsequent first sale (percentage sale). Determining whether the percentage sale price is above $1.00 per MMBtu on December 31, 1984, obviously presents the problem of determining a specific price paid on December 31, 1984. If conceived of as a daily price, a percentage sale price can fluctuate on a daily basis. For example, under a percentage sale, the price of gas, if reported on a daily basis, may be above $1.00 on December 28, below $1.00 on January 1, 1985, and above $1.00 again on January 3, 1985.

[21] Pursuant to 18 CFR 271.704(a)(3), any amount paid solely by reason of the maximum lawful price provided for production enhancement work shall be disregarded for purposes of applying section 121(a)(3) of the NGPA. This provision still applies.

The Commission faced a similar problem in Order No. 68,[22] in which the Commission had to determine whether a percentage sale exceeded the section 105 and 106(b) ceiling price. The Commission noted that "the pricing mechanisms under sections 105 and 106(b) appear to assume a specific price stipulated by the terms of the contract." That order resolved this dilemma by reference to the subsequent resale between the percentage sale buyer and subsequent purchaser (resale contract). If the resale contract was within the ceiling price authorized by the NGPA, then the Commission assumed that the price paid under the percentage sale was within the ceiling price of the NGPA. The Commission noted that this was "the only practical course."

For purposes of determining whether section 105 gas subject to percentage sales contracts is priced above $1.00 per MMBtu and thereby deregulated, the Commission proposed to follow the same rule established in Order No. 68. As proposed in § 271.506(c), if a resale contract that follows a prior percentage sale is above $1.00 per MMBtu, the Commission would deem the percentage sale deregulated by operation of section 121. Conversely, if the price paid under the resale contract is below $1.00 per MMBtu on December 31, 1984, then the Commission will deem the percentage sale not deregulated by operation of section 121.

All but one commenter on this issue supported the Commission's proposal. Most stated that this approach offered the benefit of administrative simplicity and convenience for all concerned. The objecting commenter (a State agency) stated that it did not believe "sufficient protection" would be afforded by this approach, although it seemed to agree that any impact in the current market appeared "to lack harmful effect."

[22] Rules Generally Applicable to Regulated Sales of Natural Gas and Ceiling Prices, 45 FR 5678 (Jan. 24, 1980) (Order No. 68).

The Commission recognized that under this proposal, there may be certain instances where the price paid under the resale contract is over $1.00 per MMBtu and the percentage given to the seller is less than $1.00 per MMBtu, and thus is not technically eligible for price decontrol. The Commission believes that this problem is *de minimis*. Under section 105, the ceiling price for a percentage resale that remains regulated is the section 102 price ($3.845 – December 1984). The Commission believes that, given the current surplus market, there will be few instances in which the price collected for a percentage sale of deregulated gas would exceed or equal the section 102 price. Thus, it makes little practical difference whether the Commission considers these percentage sales regulated or deregulated sales. Also, a decision to deregulate the percentage sale contract will have no rate impact on consumers since the resale contract already qualified for a deregulated price.

The Commission, therefore, will resolve the percentage sale problem as was done in Order No. 68, and proposed in the NOPR.

3. Indefinite Price Escalator Clause Issues

The NGPA at section 105(b)(3)(B) defines the term "indefinite price escalator clause" to include any provision of any contract –

> (i) Which provides for the establishment or adjustment of the price for natural gas delivered under such contract by reference to other prices for natural gas, for crude oil, or for refined petroleum products; or
>
> (ii) Which allows for the establishment or adjustment of the price of natural gas delivered under such contract by negotiation between the parties.

15 U.S.C. 3315(b)(3)(B) (1982).

The Commission expects there may be some instances where the parties disagree as to whether a specific clause is an indefinite price escalator clause under this definition.

In the preamble to Order No. 23 [23] the Commission gave several examples of clauses in intrastate contracts that fall within the section 105(b)(3)(B) definition of indefinite price escalator clauses – most-favored-nations clauses, price-reference clauses, certain redetermination clauses, FPC clauses, area rate clauses, and other such clauses.[24] The Commission proposed that these clauses are within the definition of indefinite price escalator clauses in section 105(b)(3)(B) and should be used in applying that definition to interstate contracts.

Commenters generally agreed that these types of clauses generally met the section 105(b)(3)(B) definition of indefinite price escalator clause. Commenters argued, however, that although the Commission may define the parameters of what an "indefinite price escalator clause" is for section 105 purposes, it may not address other related questions that are essentially contractual. Such questions are to be left to the State or Federal courts. *See Pennzoil Co.* v. *FERC*, 645 F.2d 360, 382 (5th Cir. 1981).

The Commission here reaffirms its position that the types of clauses found in Order No. 23 to be indefinite price escalator clauses are also indefinite price escalator clauses under section 105(b)(3)(B) and should be so construed in applying the definition to intrastate contracts.

4. Forum for Resolving Disputes Over Indefinite Price Escalations

Disputes over the application of section 105 of the NGPA to particular contractual agreements are necessarily a hybrid. On the one hand, they present statutory inter-

[23] Final Regulations Amending and Clarifying Regulations Under the Natural Gas Act and the Natural Gas Policy Act, 44 FR 16895, 16898 (Mar. 20, 1979) (Order No. 23).

[24] In Order No. 23, the Commission was concerned with the issue of whether various contractual clauses in interstate contracts provided contractual authority to collect NGPA maximum lawful prices. Here, however, the Commission is concerned not so much with interpreting the intent of parties to contracts but with whether certain pricing clauses fall within the definition of "indefinite price escalator clause."

pretation questions derived from the federal statute. On the other hand, they present questions that are more fundamentally contractual in nature, which are more within the purview of state or federal courts, and not this agency. The line of demarcation separating the former type of questions relating to the specialized statute, and the latter type of questions that are more contractual, is not always clear-cut.

Given that these disputes involve conflict over a term defined in a federal statute and the implementation of the deregulation scheme of section 121, the Commission is convinced that it could exercise exclusive jurisdiction over these disputes if it deemed it necessary. Recognizing, however, that these disputes involve serious questions of contract interpretation between parties residing in the same state, the Commission believes its federal obligation is met by giving the guidance above as to what clauses in intrastate contracts are indefinite price escalator clauses and then allowing further disputes over these clauses to be decided in any appropriate judicial forum.

The notice proposed in § 271.506(a) that the Commission would have exclusive jurisdiction and that a petition for declaratory order "shall" be filed in instances where there is a conflict as to whether a contract clause meets the definition of indefinite price escalator in section 105(b)(3)(B). Many commenters objected to the mandatory nature of this regulation. Commenters were concerned that the potential for contract-by-contract Federal involvement in intrastate contract disputes might ensue, that staff resources might be diverted from the Commission's primary statutory responsibilities into a plethora of contractual issues, and that the jurisdiction of more appropriate forums would be intruded upon. We agree.

Upon consideration, we have determined to delete any references to this Commission's exclusive jurisdiction and the use of a declaratory order. The Commission has

already given guidance as to the types of clauses that fall within the section 105(b)(3)(B) definition. The commenters have convinced us that these disputes are better resolved by judicial forum that is more typically the forum for contract disputes. This decision is further supported by the fact that, by definition, these are contracts involving producers, pipelines, and consumers in the same state. Thus we believe that either state or federal courts should exercise exclusive jurisdiction over these contract disputes.

E. Miscellaneous Issues

The Commission encouraged comments on additional issues in the NOPR and commenters raised many points, several of which require clarification and, in some instances, conforming amendments to the regulations in light of the changes that will be made by the NGPA on January 1, 1985.

1. Section 103, Impact of New Price Ceiling

The ceiling price of tight formation gas, as well as the price of certain production enhancement gas, is keyed to the price of gas under section 103 of the NGPA. The tight formation ceiling price, for example, is 200 percent of the section 103 price, and the formula for determining the price of qualified producton enhancement gas at § 271.704(c)(1)(v) also employs a ceiling calculation based on 200 percent of the section 103 price.

On January 1, 1985, the NGPA provides for a new ceiling price for section 103 gas from wells 5,000 feet or less in depth (for gas which was not committed or dedicated to interstate commerce on April 20, 1977), which is *midway* between the section 102 ceiling price and the "old" section 103 ceiling price. As a consequence, the question arose as to whether to base the tight formation and production enhancement prices on the "new" higher section 103 price after 1984, or to continue using the "old" section 103 price as the price ceiling. Inasmuch as the production enhance-

ment and tight formation prices were established with the intent of using the "old" section 103 price as the reference point, the "old" section 103 price shall continue to be used for this purpose after January 1, 1985. Conforming amendments to the pricing table in the regulations are being made to show both the "old" and "new" section 103 ceiling prices.

2. Section 110 Add-Ons

There was some comment that the Commission should clarify its regulations to indicate that the allowances under section 110 of the NGPA are not available for gas that is deregulated under the NGPA. The Commission believes that the allowances in § 271.1104 for production-related costs should cease to apply to gas that is deregulated on January 1, 1985. Because the price for deregulated gas will be determined by market forces, presumably any production-related costs will be considered in the price ultimately agreed to. Thus, there is no need for a ceiling on the amount a seller can collect for production-related costs for deregulated gas. The Commission believes that this approach is consistent with a decision by Congress to subject a substantial amount of interstate and intrastate gas to market forces after January 1, 1985. It makes little economic sense to keep one component of the price of gas subject to a ceiling while deregulating another component since a seller could legitimately increase the nonregulated components to compensate for cost limitations on the regulated component.

3. Measurement of 5,000 feet and "Committed or Dedicated" Status for Section 103 Purposes

A clarification was requested by some commenters concerning the allocation of production of section 103 gas some of which may be above, and some below 5,000 feet, and some of which may have been committed or dedicated to interstate commerce on April 20, 1977, while some of

which was not. One commenter suggested gas production must be allocated between the regulated and deregulated categories. The Commission generally concurs with this approach. Similarly, where a well is perforated both above and below 5,000 feet, allocation of production would be appropriate if such perforations are in different completion locations. In the case of open hole completions, it also may be appropriate to allocate production to different completion locations.

4. 18 CFR 270.207 and 272.105

On April 22, 1980, the Commission issued a final rule defining and deregulating certain high-cost gas under NGPA sections 107(c)(1)-(4). (Docket No. RM79-44, Order No. 78, 45 FR 18092). One of the Commission's concerns therein was that situations could arise where prices paid for deregulated gas may be paid as consideration for the sale of gas still subject to price regulations, and thus possibly circumventing the applicable maximum lawful prices. To prevent this, §§ 270.207 and 272.105 were promulgated. These regulations prohibit any part of the price paid for deregulated high-cost gas from being used as consideration for regulated gas, and require separate billing for deregulated high-cost gas. Several commenters requested that these sections be amended to include gas that will be deregulated on January 1, 1985. We agree that the price paid for deregulated gas should not reflect an add-on to avoid the ceiling price for other gas sales that remain regulated.

5. Emergency Contract Carriage

A number of commenters suggested that if a seller's first sale volumes are "marketed-out" by a purchaser as a result of deregulation on January 1, 1985, then an emergency contract carriage arrangement would give the seller needed assistance to enable the seller to find alternate markets for its gas. Another commenter noted that the Commission

may not have the authority to accomplish all that has been suggested on this issue. Another commenter asked that the Commission set in motion immediately a rulemaking to establish a contract carriage system.

The Commission has already allowed competitive pressures to operate more freely in the gas marketing network by means of a number of special marketing programs, which are being monitored closely. Whether it is more appropriate to explore contract carriage possibilities in the context of those programs, or elsewhere, is a matter requiring careful assessment to avoid precipitate action and the imposition of any further regulatory distortion in the natural gas markets.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires certain statements, descriptions, and analyses of rules that will have a "significant economic impact on a substantial number of small entities."[25] The Commission is not required to make such an analysis if it certifies that a rule will not have a "significant economic impact on a substantial number of small entities."[26]

There are approximately 10,000 natural gas producers in the United States, many of which would be classified as small entities under the appropriate RFA definition.[27] In the proposed rule, the Commission noted that the rule might affect most of these entities by amending the filing requirements that must be followed for gas that will be deregulated on January 1, 1985. The Commission stated

[25] 5 U.S.C. 603(a) (1982).

[26] *Id.* at section 605(b).

[27] *Id.* at section 601(3) *citing to* section 3 of the Small Business Act, 15 U.S.C. 632 (1982). Section 3 of the Small Business Act defines small business concern as a business which is independently owned and operated and which is not dominant in its field of operation.

that, while these changes would be important in implementing deregulation under the Natural Gas Policy Act, the Commission did not believe that the burden imposed by these regulations would be significant. The Commission believed that for the most part, these regulations would merely make legal decisions and technical corrections necessary to implement the statute. In those few instances where the Commission proposed to amend its regulations based on policy, the Commission believed that the economic impact, if any, would not be "significant." Accordingly, the Commission certified the proposed rule, if promulgated, would not have a significant economic impact on substantial number of small entities.

Six commenters challenged this certification. These commenters focused on the Commission's proposed interpretation requiring gas to be deregulated if it qualified for both a regulated and a deregulated category of gas. They argue that they and other small entities would suffer severe economic impacts if the Commission required that they collect a deregulated price for certain section 107 tight formation gas and section 108 stripper well gas that also qualified for a deregulated category (e.g., section 102(c) or section 103(c)). They argue that, given the current surplus market, they would receive a much lower price for this gas if it were considered deregulated.

The Commission believes the certification in the proposed rule was proper. The Commission's proposed rule drew a distinction between rules adopted for policy reasons and rules that embodied legal requirements of the NGPA. The Commission believes that the NGPA itself requires the deregulation of gas qualifying for both a regulated and a deregulated category; this is not a policy decision over which the Commission can be influenced by the economic impact on small businesses.

The Commission believes this distinction is supported by the RFA and its legislative history. Section 2 of the

RFA, stating the purposes of the Act, encourages the consideration of "alternative regulatory approaches which do not conflict with the stated objectives of applicable statutes * * *."[28] Additionally, the Act states that the requirements of the RFA to do a regulatory flexibility analysis "[does] not alter in any manner standards otherwise applicable by law to agency action."[29] Similarly, the Senate Report states that "agencies [should] give explicit consideration to a range of alternatives that would substantially reduce the economic impact of the rule * * * while meeting the goals and purposes of the governing statute."[30] Numerous statements made by Congressmen and Senators at the time of passage of the RFA support the distinction between legal requirements mandated by statute and those adopted as a matter of policy.[31]

As noted above, the Commission believes that Congress intended that gas that qualifies for a deregulated category would be priced according to market forces. While some small producers may suffer severe economic impacts, the Commission believes these impacts are caused by Congress' scheme of deregulation, not by any discretionary policy adopted by this Commission. Accordingly, the Commission continues to believe that it correctly certifed that this rule will not have a significant economic impact on a substantial number of small entities.

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[28] Pub. L. No. 96-354, 94 Stat. 1164 at section 2(a)(7).

[29] 5 U.S.C. 606 (1982).

[30] S. Rep. No. 878, 1980 U.S. Code Cong. & Ad. News 2788.

[31] *See also* 126 Cong. Rec. H. 8463 (daily ed. Sept. 8, 1980) (Statement of Congressman McDade); 126 Cong. Rec. H 8468 (daily ed. Sept. 8, 1980) (Statement of Congressman Andy Ireland) ("Statutory mandates must never be compromised . . . ."); 126 Cong. Reg. H 8472 (daily ed. Sept. 8, 1980) (Statement of Congressman Butler); 126 Cong. Rec. S 10937-38 (daily ed. August 6, 1980) (Statement of Senator Culver) (extensive analysis on "Preserving Statutory Objectives.").

V. Effective date

This rule will become effective on January 1, 1985, to correspond with the date of decontrol under the NGPA.

List of Subjects in 18 CFR Parts 270 through 274

Natural gas, Incentive prices.

In consideration of the foregoing, the Commission amends Parts 270 through 274, Subchapter H, Chapter 1, Title 18 Code of Federal Regulations, as set forth below.

By the Commission.

Kenneth F. Plumb,
Secretary.

PART 270—[AMENDED]

1. The authority citation for Part 270 is revised to read as follows:

Authority: Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432.

§ 270.101 [Amended]

2. Section 270.101(a) is amended by removing the words "high-cost" and inserting, in their place, the word "natural."

3. Section 270.101(c)(2) is revised to read as follows:

§ 270.101 Application of ceiling prices to first sales of natural gas.

* * * * *

(c) * * *

(2) The price of gas is deregulated only if such gas is deregulated natural gas as defined in § 272.103(a).

* * * * *

§ 270.102 [Amended]

4. Section 270.102(b)(14) is amended by removing the words "high-cost" and inserting, in its place, the word "natural."

§ 270.207 [Amended]

5. Section 270.207 is amended by removing the word "high-cost" and inserting, in its place, the world "natural" in the title and three times in the text.

6. A new § 270.208 is added to read as follows:

§ 270.208 Applicability of section 121.

First sale of natural gas that is deregulated natural gas as defined in § 272.103(a) is price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

PART 271–[AMENDED]

7. The authority citation for Part 271 is revised to read as follows:

Authority: Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432.

8. The table following § 271.101 is amended by adding a sentence at the end of footnote 1, adding footnotes 4 and 5, revising designation C-103, and adding new designations C-103(b)(2) and E-105(b)(3) in the columns reading "Subpart of Part 271–NGPA Section," to read as follows:

§ 271.101 Ceiling prices for certain categories of natural gas.

* * * * *

TABLE I.–NATURAL GAS CEILING PRICES (OTHER THAN NGPA SECTION 104 AND 106(a))

Subpart of part 271	NGPA section	Category of gas	Maximum lawful price per MMBtu for deliveries in
B	102	New natural gas, certain OCS gas[4]	....
C	103(b)(1)	New, onshore production wells[5]	....
C	105(b)(3)	New, onshore production wells[5]	....
E	105(b)(3)	Existing intrastate contracts	....
F			....
G			....
H			....
I			....

[1] * * * Commencing January 1, 1985, the price of some intrastate rollover gas is deregulated. (See Part 272 of the Commission's Regulations.)

* * * * *

[4] Commencing January 1, 1985, the price of natural gas finally determined to be new natural gas under section 102(c) is deregulated. (See Part 272 of the Commission's Regulations.)

[5] Commencing January 1, 1985, the price of some natural gas finally determined to be natural gas produced from a new, onshore production well under section 103 is deregulated. (See part 272 of the Commission's Regulations.)

9. Section 271.201(a) is revised to read as follows:

§ 271.201 Applicability.

This subpart implements section 102 of the NGPA and applies to the first sale of:

(a) new natural gas which is not deregulated natural gas (see § 272.103(a)); or

* * * * *

10. Section 271.301 is revised to read as follows:

§ 271.301 Applicability.

This subpart implements section 103 of the NGPA and applies to the first sale of natural gas produced from a new, onshore production well, if such gas is not deregulated natural gas (see § 272.103(a)).

11. Section 271.501 is amended by revising the first sentence to read as follows:

§ 271.501 Applicability.

This subpart implements section 105 of the NGPA and applies to the first sale of natural gas under an existing intrastate contract or under a successor to a intrastate contract, if such natural gas is not deregulated natural gas (see § 272.103(a)). * * *

§ 271.502 [Amended].

12. Section 271.502(a) is amended by removing from the title the words "November 9, 1978, contract price at or below $2.06 per MMBtu."

13. Section 271.502(b) introductory text and (b)(1) are revised to read as follows:

§ 271.502 Maximum lawful prices.

* * * * *

(b) In the case of any first sale of natural gas to which this subpart applies and for which the price paid exceeds $1.00 per MMBtu on December 31, 1984 (or would exceed $1.00 per MMBtu if sold on such date) solely by operation of an indefinite escalator clause, the maximum lawful price for natural gas delivered in any month shall be the higher of:

(1) The maximum lawful price per MMBtu for such month specified for Subpart E of Part 271 in Table I of § 271.101(a); or

* * * * *

14. A new § 271.506 is added to read as follows:

§ 271.506 Rules related to deregulation of intrastate gas.

(a) *Contracts over $1.00 by virtue of a definite price clause.* The price of natural gas subject to this subpart is deregulated if the price paid under a clause other than an indefinite price escalator clause is higher than $1.00 per MMBtu for the last deliveries of such gas occurring on December 31, 1984, or if no deliveries occurred on such date, the price that would have been paid had deliveries occurred on such date.

(c) *Percentage-of-proceeds sales.* The price of natural gas sold under a percentage-of-proceeds contract subject to this subpart is deregulated if the price paid on the resale contract is deregulated under Part 272. (§ 270.202(b) states other rules for percentage-of-proceeds sales.)

15. Section 271.601 is revised to read as follows:

§ 271.601 Applicability.

This subpart implements section 106(b) of the NGPA and applies to the first sale of natural gas under an intrastate rollover contract, if such natural gas is not deregulated natural gas (see § 272.103(a)).

16. Section 271.703(a)(2) is revised to read as follows:

§ 271.703 Tight Formations.

(a) * * *

(2) 200 percent of the maximum lawful price specified for subpart C—NGPA Section 103(b)(1) of Part 271 in Table I for § 271.101(a).

* * * * *

§ 271.704 [Amended]

17. Section 271.704(c)(1)(v) is amended by removing the words "Subpart C" and inserting, in its place, the words "Subpart C—NGPA section 103(b)(1)."

PART 272—[AMENDED]

18. The authority citation for Part 272 reads as follows:

Authority: Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432.

§§ 272.101 and 272.102 [Amended]

19. Sections 272.101 and 272.102 are amended by removing the words "high-costs" and inserting, in their place, the word "natural."

20. In § 272.103, paragraph (a) is revised to read as follows:

§ 272.103 Definitions.

(a) "Deregulated natural gas" means:

(1) Natural gas for which a jurisdictional agency determination has become final under Parts 274 and 275 that the gas qualifies as:

(i) Deep, high-cost natural gas;

(ii) Gas produced from geopressured brine;

(iii) Occluded natural gas produced from coal seams; or

(iv) Gas produced from Devonian shale.

(2) Natural gas for which a jurisdictional agency determination becomes final under Parts 274 and 275 and which is sold in a first sale on or after January 1, 1985, and such gas qualifies as:

(i) New natural gas as defined in § 271.203;

(ii) Natural gas produced from any new, onshore production well if such gas as defined in § 271.303:

(A) Was not committed or dedicated to interstate commerce (as defined in NGPA section 2(18)) on April 20, 1977; and

(B) Is produced from a completion location which is located at a depth of more than 5,000 feet.

(3) Natural gas sold under an existing intrastate contract, any successor to an existing contract or any rollover contract, if:

(i) Such natural gas was not committed or dedicated to any interstate commerce on November 8, 1978; and

(ii) In the case of any existing or successor contract, the price paid under a clause other than an indefinite price escalator clause for the last deliveries of such natural gas occurring on December 31, 1984, or, if no deliveries occurred on such date, the price that would have been paid had deliveries occurred on such date is higher than $1.00 per MMBtu.

(iii) In the case of any rollover contract, the price paid on December 31, 1984, or if no deliveries occurred on such date, the price that would have been paid had delivery occurred on such date is higher than $1.00 per MMBtu.

* * * * *

21. Section 272.104 is revised to read as follows:

§ 272.104 Special rules for measuring the depth of deregulated natural gas.

For purposes of determining the depth of a completion location under §§ 272.103(a)(2)(ii)(B) and 272.103(b), measurement shall be the true vertical depth from the surface location to the highest perforation point in the completion location.

§ 272.105 [Amended]

22. Section 272.105 is amended by removing the words "high cost" where they occur and inserting, in their place, the word "natural."

PART 273—[AMENDED]

23. The authority citation for Part 273 is revised to read as follows:

Authority: Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432.

24. Section 273.202(a)(2) is revised to read as follows:

§ 273.202 Collection pending jurisdictional agency determination of eligibility.

(a) * * *

(2) If an application has been filed with the jurisdictional agency for a determination of eligibility under Part 272 (relating to deregulated natural gas), the deregulated price may be charged pending the jurisdictional agency determination.

* * * * *

25. Section 273.203(a)(2) is revised to read as follows:

§ 273.203 Collection pending review of jurisdictional agency determination.

(a) * * *

(2) If a jurisdictional agency has determined in accordance with Part 274 that natural gas qualifies under Part 272 (relating to deregulated natural gas), the seller may charge and collect the deregulated price during the period described in paragraph (b) of this section.

* * * * *

26. In § 273.204, a new paragraph (a)(1)(iv) is added to read as follows:

§ 273.204 Retroactive collection after final determination.

(a) * * *

(1) * * *

(iv) in the case of a new natural gas (as defined in § 271.203) and natural gas produced from a new, onshore

production well (as defined in § 271.303) which also satisfies the criteria of § 272.103(a)(3), if the application for determination was filed on or before January 1, 1985, then for the first sales of such natural gas delivered on or after January 1, 1985, the seller may retroactively collect the amount by which the deregulated price exceeds the price collected during such period.

* * * * *

§ 273.204 [Amended]

27. Section 273.204(a)(2) is amended by removing the words "Part 272" and inserting, in their place, the words "§ 272.103(a)(1)."

PART 274—[AMENDED]

28. The authority citation for Part 274 is revised to read as follows:

Authority: Natural Gas Policy Act of 1978, 15 U.S.C. 3301-34342; Department of Energy Organization Act, 42 U.S.C. 7101-7352.

29. Section 274.101 is amended by revising the introductory language to read as follows:

§ 274.101 Applicability.

This part applies to determinations of jurisdictional agencies (as defined in § 274.501) made under § 272.103(a)(1) and the following subparts of Part 271:

§ 274.104 [Amended]

30. Section 274.104(a) is revised by removing the words "for a maximum lawful price."

APPENDIX F

18 CFR Parts 270, 271, 272, and 273

[Docket No. RM84-14-001, *et al.*, Order No. 406]

Deregulation and Other Pricing Changes on January 1, 1985, Under the Natural Gas Policy Act

Issued: December 21, 1984.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order denying rehearing in part, granting rehearing in part, denying stay and making technical corrections.

SUMMARY: On November 16, 1984, the Federal Energy Regulatory Commission (Commission) issued a final rule in Docket No. RM84-14-000, Order No. 406, 49 FR 46874 (November 29, 1984), amending its regulations to prepare for price deregulation under section 121 of the National Gas Policy Act for certain types of gas subject to sections 102, 103, 105, and 106, and publishing new maximum lawful prices under sections 103(b) and 105(b)(3). The Commission received 18 timely petitions for rehearing of the final rule in this docket and two late filings that have been treated as petitions for reconsideration. For the reasons detailed in its order, the Commission is denying in part and granting in part rehearing of the final rule and denying stay. This order also makes several technical corrections to the final rule to clarify the regulations.

EFFECTIVE DATE: This order will become effective January 1, 1985.

FOR FURTHER INFORMATION CONTACT:
Peter J. Roidakis (202) 357-8307 or Elizabeth Pendley (202) 357-8476 at the Office of the General Counsel; Federal Energy Regulatory Commission; 825 North Capitol Street, NE., Washington, D.C. 20426.

SUPPLEMENTARY INFORMATION:

Before Commissioners: Raymond J. O'Connor, Chairman; Georgiana Sheldon, A. G. Sousa, Oliver G. Richard III and Charles G. Stalon.

I. Introduction

The Federal Energy Regulatory Commission (Commission) is granting in part and denying in part applications for rehearing of its final rule in Order No. 406,[1] which amended its regulations to prepare for price deregulation under section 121 of the Natural Gas Policy Act of 1978 (NGPA) for certain types of gas subject to NGPA sections 102, 103, 105 and 106. The Commission received timely applications for rehearing of the final rule from eighteen petitioners.[2] For the reasons stated below and those set

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[1] 49 FR 46,874 (Nov. 29, 1984).

[2] Martin Oil Service, Inc., Martin Exploration Management Corporation, Colorado Energy Corporation, RM84-14-001, December 4, 1984; Public Service Commission of the State of New York, RM84-14-002, December 12, 1984; Mitchell Energy Corporation, RM84-14-003, December 14, 1984; Indicated Producers, RM84-14-004, December 14, 1984; Oklahoma Natural Gas Company, a division of ONEOK Inc., RM84-14-005, December 14, 1984; Barrett Energy Company, *et al.* and Calvin Petroleum Corporation, RM84-14-006, December 14, 1984; Louisiana Intrastate Gas Corporation, RM84-14-007, December 14, 1984; Transok, Inc., RM84-14-008, December 14, 1984; Independent Oil and Gas Association of West Virginia, RM84-14-009, December 14, 1984; Independent Oil and Gas Association of New York, RM84-14-010, December 17, 1984; National Fuel Gas Distribution Corporation, RM84-14-011, December 17, 1984; Mr. John H. Hill, RM84-14-012, December 17, 1984; P.S.E.C., Inc., RM84-14-013, December 17, 1984; Pennsylvania Natural Gas Associates, RM84-14-014, December 17, 1984; Damson Oil Corporation and Samson Resources Company, RM84-14-015, December 17, 1984; Amoco Production Company, RM84-14-016, December 17, 1984; Conoco Inc., RM84-14-017, December 17, 1984; Ohio Oil and Gas Association, RM84-14-018, December 17, 1984.

forth in the final rule, this order grants rehearing in part, denies rehearing in part, and denies applications for stay.[3]

II. Background

On January 1, 1985, NGPA section 121 will deregulate the prices for substantial amounts of intrastate and interstate gas. Section 121(a) eliminates price controls from "new natural gas" defined in section 102(c)[4] and certain gas produced from "new, onshore production wells" under section 103.[5] Except for gas that is subject to section

The Commission also received a petition for reconsideration from Louisiana Resources Corporation, RM84-14-020, December 18, 1984 and an untimely filed petition for rehearing from the Pennsylvania Oil and Gas Association (POGAM), RM84-14-019, December 18, 1984. The Commission will consider POGAM's petition as a petition for reconsideration rather than a petition for rehearing.

[3] Two petitioners requested stay of Order No. 406 pending consideration of the rehearing petitions and possible court review. The Commission denies the requests for stay as not in the public interest. Deregulation will occur on January 1, 1985. Rules for orderly transition are necessary; Order No. 406 promulgates these rules. Therefore, it is not in the public interest to grant a stay of these rules.

[4] "New natural gas" under section 102(c) covers three types of gas: (1) gas produced from the Outer Continental Shelf under a lease entered into, on or after April 20, 1977; (2) gas produced from an onshore well on which surface drilling began on or after February 19, 1977, or the depth was increased by 1,000 feet on or after that date, and which is at least 2.5 miles from the nearest marker well or which is 1,000 feet deeper than the deepest completion location of any marker well within 2.5 miles; and (3) gas produced from a reservoir from which natural gas was not produced in commercial quantities before April 20, 1977, subject to certain exclusions.

[5] "New onshore production wells" under section 103(c) are onshore wells on which surface drilling began on or after February 19, 1977, and from which gas is produced from a proration unit that meets certain requirements. Section 121 deregulates on January 1, 1985, the price of gas produced from section 103 wells where the gas was not committed or dedicated to interstate commerce on April 20, 1977, and is produced from a completion location deeper than 5,000 feet.

121(e), section 121 also deregulates the price of intrastate gas that is categorized as section 105 or 106(b) gas, if the price paid for the last deliveries of such natural gas occurring on December 31, 1984 (or, if no actual deliveries occurred on that date on December 31, 1984, the price that would have been paid for deliveries) is higher than $1.00 per MMBtu.[6]

In general, the Commission's final rule stated (1) that jurisdictional agency determinations are still necessary for section 102 and section 103 gas after January 1, 1985; (2) that first sellers may make interim collections at the agreed upon deregulated price; (3) that gas which qualifies for both a regulated and a deregulated category will be deregulated; (4) that contract prices for intrastate contracts above $1.00 per MMBtu by virtue of a definite price clause would not be subject to the limitation imposed by section 121(e).

Rehearing was requested on two primary issues: (A) whether gas which qualifies for a regulated and a deregulated category will deregulate on January 1, 1985; and (B) whether certain intrastate gas will be deregulated.

III. Disposition of Applications for Rehearing

A. Dual Qualification Gas

In the final rule on deregulation of certain NGPA gas categories, the Commission stated that gas which qualified for a regulated and a deregulated category will be deregulated.[7]

[6] *See* 15 U.S.C. 3331(e) (1982).

[7] Some examples of dually qualified gas—one regulated under a maximum lawful price and one which will be deregulated on January 1, 1985 are—(1) new tight formation gas (section 107(c)(5)) which also qualifies under section 102(c) or qualifying section 103 in order to receive the section 107(c)(5) incentive price; (2) some stripper well gas (section 108) which also has determinations as section 102(c), or section 103 which qualifies for deregulation or section 105 deregulated gas.

Fourteen petitioners requested rehearing on this issue, stating that the decision on dually qualified gas in the final rule did not accurately mirror Congressional intent, was unlawful or arbitrary, and would lead to unintended results in the marketplace. These objections were addressed in the final rule. For the reasons listed in the final rule and reemphasized here, the applications for rehearing on this issue are denied.

(1) Section 121 Mandates Deregulation

The Commission recognizes that Congress had two major objectives in mind when it passed the NGPA in 1978. First, in the short term, it maintained a regulatory structure of price controls and, within that structure, provided incentives to encourage exploration and development of new reserves and, second, in the long term, it gradually substituted market forces for regulated prices by phasing in deregulation in 1985 and 1987. Petitioners believe that the Commission's determination for dealing with dually qualified gas creates a conflict between these two objectives. The Commission disagrees. The deregulation of certain categories of natural gas as provided in the NGPA is not in conflict with the goal of increasing energy supplies. Indeed, deregulation fosters this goal. Without question, phased deregulation was one of the primary methods utilized by Congress to increase energy supplies.[8]

[8] *See* Cong. Rec. S15219 (September 15, 1978), in which Senator Bartlett introduced a letter written by President Jimmy Carter to the Governor of Oklahoma; "The decontrol of producers' prices for new natural gas would provide an incentive for new exploration and would help our nation's oil and gas operators attract needed capital. Deregulation of new gas would encourage sales in the interstate market and help lessen the prospect of shortages in the nonproducing states which rely on interstate supplies. While encouraging new production, this proposal will protect the consumer against sudden sharp increases in the average price of natural gas."

The statute clearly states that price controls for certain section 102(c), qualifying section 103(c) and section 105 gas "shall * * * cease to apply January 1, 1985." NGPA section 121 mandates deregulation for these categories of gas. The fact that some of this gas also qualifies for another gas category does not alter this Congressional mandate to deregulate. The Commission is well aware that the NGPA does not deregulate section 107(c)(5) gas[9] or section 108 gas; the NGPA does, however, deregulate gas under either of those categories which also qualifies for a category which is deregulated on January 1, 1985. In support of the Commission's position, in the September 25, 1978 Senate floor debate, it was stated that stripper wells are deregulated:

> only to the extent that such wells are otherwise new wells and would be deregulated any way. Their character as stripper wells, as shown under section 121 does not get them deregulated in any way.[10]

As noted in the final rule, Congress recognized that gas could simultaneously receive a dual qualification, one for when the gas is regulated, *i.e.*, a stripper well qualification, and one for when the gas will be deregulated, *i.e.*, a section 102(c) new gas determination.[11] By permitting the determination process to qualify the same gas for regulated and deregulated categories at the same time, the path was streamlined for deregulation on January 1, 1985. This gas is *dually* qualified; each determination is necessary for a specific period of time. The Commission believes that one determination for the regulated category could govern until January 1, 1985, and then the determination for the deregulated category could take effect.

[9] Approximately 40% of new tight formation wells will not be deregulated because they are above the 5000 foot depth requirement for section 103 deregulation.

[10] Cong. Rec. S15997 (September 25, 1978).

[11] Cong. Rec. H13115-17 (October 14, 1978).

Additionally, section 121 contains exclusions from deregulation for Alaskan natural gas and for intrastate gas priced under indefinite price escalators. It does not, however, include an exemption for dually qualified gas. It does not include an exemption where a lower deregulated market price was unanticipated in 1978. It does not include an exemption allowing the parties to choose to remain regulated. Considering the Congressional intent to deregulate natural gas, and its failure to articulate a specific statutory exemption for dually qualified gas, the Commission has concluded in Order No. 406 that gas that is dually qualified is deregulated on January 1, 1985. The Commission affirms that determination.

(2) Section 101(b)(5)

Section 101(b)(5) states: "If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable."

Petitioners assert that section 101(b)(5) permits them to choose a regulated price for dually qualified gas, their contract provided if they receive a higher price for regulated gas than for deregulated gas. The Commission disagrees with this statutory interpretation.

Section 121 states that the "provisions of subtitle A respecting the maximum lawful prices" for the first sale of section 102, section 103 and section 105 cease to apply, effective January 1, 1985. Various commenters to the Commission's proposed rule concluded that section 101(b)(5) no longer applies once deregulation occurs since section 101 is a "provision of subtitle A" that would "cease to apply" to deregulated gas. Several commenters also state that deregulated gas was not covered by section 101(b)(5) since such gas was not an "exemption from such" maximum

lawful price. These commenters argue that "exemption" does not refer to deregulated gas. To bolster this position the commenters refer to a statement made by Congressman Dingell in referring to section 101(b)(5) that "this rule is intended to facilitate resolution of which *ceiling price* may apply if more than one ceiling price rule appears applicable." (emphasis added).[12] Thus, these commenters argue that the Dingell statement makes it clear that producer choice exists with regard to two regulated ceiling prices and not to a choice between a regulated and a deregulated price.

The Commission recognizes that there may be some merit to these arguments. However, even if section 101(b)(5) does in fact apply to deregulated gas, the Commission believes that the statutory language compels the gas to be sold at a deregulated price. The language of section 101(b)(5) states that the producer may choose the NGPA category which "could result in the highest price." Without question, a deregulated price *could* always result in a price higher than a regulated price which is subject to a ceiling price; whether the *contract* allows the producer to collect a price higher than a regulated price is a contractual issue, not an issue raised by the deregulation scheme of the NGPA.[13]

Therefore, the Commission states that section 121 is self-executing. Price deregulation occurs by operation of law. There is no statutory allowance for the producer or the purchaser to choose whether or not to deregulate gas that qualifies under section 121 for deregulation.

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[12] *See* 124 Cong. Rec. H 13116 (October 14, 1978).

[13] *See* H.R. Rep. No. 1752, 95th Cong., 2nd Sess. 75 (1978) in which the Conference Report states that section 101(b)(5) "provides that if natural gas qualifies under more than one price category, the provisions that permit the seller to obtain the highest price applies."

(3) Claims of Reliance

Petitioners claim that they relied to their detriment on the continued availability of the incentive price in section 107(c)(5) and in section 108 by making investments they would not otherwise have made. They allege that the Commission may not arbitrarily limit their ability to collect the incentive price.

Upon enactment by Congress of the NGPA on November 9, 1978, producers were aware that section 121 required deregulation of section 102, qualifying section 103 and section 105 gas. The impending deregulation of these sections should not suprise producers.

Initially, the Commission cites the statement by Congressman Dingell who, when discussing the meaning of dual qualification, stated, "A single proceeding to determine qualification for both designations (new natural gas and stripper well gas) would permit the producer to obtain stripper well pricing under section 108 prior to January 1, 1985, and deregulation as new gas thereafter." [14] Thus, producers should have known that certain dually qualified gas would be deregulated by the NGPA on January 1, 1985.

Furthermore, producers recognized that the new tight formation gas incentive price was an interim measure which would be discard once deregulation occurs, and stated this position as early as 1979 in filed comments on the tight formation rulemaking.[15] The Commission stated this position in the preamble to the tight formations rulemaking.[16] The Commission believes that producers were in fact aware of the limited time during which incentive prices would be available, if related to categories of gas

[14] *See* Cong. Rec. H 13116-17, October 14, 1978.

[15] *See* Order No. 406, 49 FR 46,878 (Nov. 29, 1984).

[16] Interim Rule Covering High-Cost Natural Gas from Tight Formations, 45 FR 13,414 (Feb. 28, 1980).

which will be deregulated.[17] Faced now with a different economic climate upon deregulation than previously anticipated, they cannot reasonably assert reliance on the continuance of incentive prices when coupled with categories of gas which will be deregulated.

The Commission noted in the final rule and asserts here that producers had no reason to rely on the continuation of regulated price categories which were linked with categories which will deregulate on January 1, 1985. The Commission believes these claims cannot be sustained.

(4) Economic Dislocation and the Gas Sales Contract

Petitioners again claim that the loss of incentive prices will cause insurmountable economic dislocation.[18]

[17] Several petitioners argue that these comments were made to the Commission's request for comments on the issue of whether new tight formation gas would deregulate if the deregulated price were higher than the incentive price. While these comments respond in the context of a different economic climate than was anticipated by them, the Commission, and, apparently, the Congress, the Commission notes that the legal result is the same. The Commission raised these comments to the tight formation rule not as support for its legal result but rather to rebut producers' current claim that they were unaware that deregulation might have an impact on tight formation gas.

[18] On a related issue, the Commission in Order No. 406 stated that it had properly certified under the Regulatory Flexibility Act (RFA), 5 U.S.C. 605(b) (1982), that the Commission's rule would not have a "significant economic impact on a substantial number of small entities." 49 Fed. Reg. at 46882-83 (Nov. 29, 1984). The Commission further noted that the economic impact caused by the deregulation of dually qualified gas is the direct result of the NGPA, not from the final rule.

One petitioner argued that the Commission has improperly interpreted the NGPA, that the Commission's final rule will cause small entities to suffer significant economic impacts, and that the Commission should, therefore, issue a final regulatory flexibility analysis required by the RFA. This petitioner's argument rests on an incorrect interpretation of the NGPA and the belief that the Commission's rule causes them economic harm. The Commission believes that any

The Commission recognizes the difficulties which may occur in adjusting to market level prices. However, the mandate of the NGPA is clear. Gas which qualifies for both a regulated and deregulated price is deregulated.

Furthermore, as was noted in the final rule, it is not the Commission which is forcing deregulation. Rather, it is the statutory language of the NGPA and the contract deregulation clauses which trigger renegotiation once deregulation occurs. Once deregultaion occurs, the contract between the parties must control and the contract terms prevail.[19] Thus, as the Commission stated in the final rule, any economic harm to producers results from the NGPA and their contracts, not from this Commission's exercise of its administrative authority to implement the NGPA. The Commission's mandate is to implement Congress' intent with regard to dual qualification gas.

(5) Section 107(c)(5) New Tight Formation Gas

Petitioners state that certain tight formation gas is only section 107(c)(5) gas and is not dual qualification gas be-

economic harm suffered by producers is caused by the NGPA, current economic conditions, and their contracts. Such economic impacts are not, for reasons stated in the final rule, cognizable under the RFA unless the agency has some discretion in tailoring its rules tc minimize such impacts. The Commission, therefore, continues to believe that it property certified that its rule, as opposed to the NGPA, will not have a "significant economic impact on a substantial number of small entities."

[19] The Commission agrees with one petitioner who suggested that upon deregulation contractual provisions could determine the price to be paid for deregulated gas by reference to a regulated maximum lawful price, whether directly or indirectly by operation of an area rate clause, favored nations clause, or other pricing provision. The Commission agrees that the seller may refer to a maximum lawful price in order to price deregulated gas, but that reference does not make the gas "regulated" gas. The NGPA regulated price used as a reference price thereby becomes the contract price.

cause in some instances it has not been determined to be section 102 or section 103 gas. They therefore claim that the Commission is deregulating a single-category of gas which the NGPA does not deregulate.

This is not so. In order to qualify as new tight-formation gas under section 107(c)(5), the gas must meet section 102 or section 103 qualification requirements as a threshold to obtaining a section 107(c)(5) determination. The Commission's regulations leave no doubt that gas must first be section 102 or section 103 gas before qualifying as new tight formation gas under section 107(c)(5) gas. Specifically, the regulations state

> new tight formation gas *is* natural gas: which *is new natural gas,* [as defined in section 102(c)), certain OCS gas qualifying for the new natural gas ceiling price (as defined in section 102(d)), or *gas produced through a new onshore production well* [as defined in section 103(c)). (Emphasis added.[20])

If the section 102(c) or 103 qualification requirements were not met, a section 107(c)(5) determination would not be granted. Indeed, producers who received tight formation determinations without meeting the threshold requirements of section 102(c) or section 103 would be in violation of the Commission's regulations. If this occurred, the Commission would toll its 45-day review period until the discrepancy in the determination was resolved. Many jurisdictional agencies require the producer to style a section 107(c)(5) application as both a section 102(c) or section 103(c) and a section 107(c)(5) determination.[21] The jurisdictional agencies, however, grant a

[20] *See* 18 CFR 271.703(b)(3)(i) (1983) and 18 CFR 274.205(e)(1)(i) (A) or (B) (1983).

[21] Texas, Pennsylvania, Louisiana, Oklahoma, Virginia and Kentucky issue formal dual determinations. Approximately 10,000 of these tight formation determinations for section 102(c) wells or for section 103 wells at a depth of at least 5,000 feet have been made (approximately 40% of all section 107(c)(5) filings).

section 107(c)(5) determination regardless of whether in form it is styled as a section 102(c) or 103 determination, because they must first reach the conclusion that the well qualifies as a section 102(c) or section 103 in order to grant new tight formation status.[22] Regardless of the formal requirements required by jurisdictional agencies, such gas is dually qualified, because a section 107(c)(5) new tight formation determination is a section 102(c) or section 103 determination. With the threshold regulatory requirements met, the gas qualifies for deregulation on January 1, 1985.

B. Deregulation of Intrastate Gas

Petitioners raise two issues regarding deregulation of certain intrastate gas. First, petitioners request that the Commission clarify how intrastate gas is deregulated by section 121(a)(3). Second, petitioners request that the Commission change its position on the effect of the section 121(e) limitation on certain contract clauses.

(1) Determining Whether Intrastate Gas Is Deregulated Under § 121(a)(3)

Several petitioners asked the Commission to clarify an ambiguity between the preamble to the final rule and the regulatory text adopted by the Commission. These petitioners indicated that the Commission's preamble suggested that all intrastate gas subject to existing, successor, and rollover contracts would be deregulated if the price is over $1.00 per MMBtu. The Commission's regulations (18

[22] Approximately 2,100 tight formation determinations have been made (approximately 10% of all new section 107(c)(5) filings for section 102(c) wells or for section 103 wells completed at a depth greater than 5,000 feet) in which the states do not formally require that it be styled a section 107(c)(5), new tight formation and a section 102(c) or section 103 application.

CFR 271.502(b), 271.506(a), and 272.103(a)(3)(ii)), however, can perhaps be read to mean that such gas is deregulated only if the price is over $1.00 per MMBtu as a result of a definite price clause.

The Commission will amend its regulations to rectify any perceived ambiguity and make clear the NGPA's deregulation scheme for intrastate gas is subject to existing, successor, and rollover contracts. Under NGPA section 121(a)(3), all gas subject to existing, successor, or rollover contracts is deregulated if "the price paid * * * on December 31, 1984, * * * is higher than $1.00 per MMBtu." Thus, all such gas is deregulated if the price is over $1.00 per MMBtu. It makes no difference whether the gas is priced under a definite price clause or an indefinite price escalator clause. If the price is over $1.00, it is deregulated under section 121(a)(3). The operation of indefinite price escalation clauses in contracts governing such deregulated gas is, however, subject to the limitation imposed by section 121(e).[23] The Commission nevertheless wishes to emphasize that, under section 121(a)(3), intrastate gas is deregulated if its price on December 31, 1984, *under any pricing clause or combination of clauses*, is over $1.00 per MMBtu. Accordingly, the Commission is amending § 271.502(b) and § 272.103(a)(3)(ii).

[23] Various commenters to the proposed rule and petitioners on rehearing attach significance to whether this price cap is characterized as "continuing regulation," "deregulation and reregulation," or "not regulation but a limitation on certain contract clauses." The NGPA is clear that section 121(e) does not impose a form of continuing regulation of first sales of section 105 gas *per se*, but merely limits the operation of particular contractual provisions. The effects, if any, of this NGPA provision on particular contracts may, of course, result in contractual disagreements. The Commission declines to resolve such disputes in a generic context.

(2) Determining the Effect of Section 121(e) and Section 105(b)(3)(A) on Certain Price Escalator Provisions

Order No. 406 provided that "where an intrastate contract contained both a fixed price term and an indefinite price term, and both were over $1.00 per MMBtu * * * the section 105(b)(3)(A) limitation would *not* apply," even if the December 31, 1984, price was actually computed under the indefinite price clause.

Six petitioners object to the Commission's interpretation. Upon consideration of these petitioners' arguments, the Commission has determined to grant rehearing on this issue, as requested by these petitioners.

Several examples will clarify the different results that would obtain under the approach adopted in Order No. 406 and the petitioners' approach adopted herein.

> *Example 1*: The price under the definite price clause is 75¢ and under the indefinite price escalator clause is $4.50.
>
> *Example 2*: The price under the definite price clause is $1.25 and under the indefinite price escalator clause is $4.50.
>
> *Example 3*: The price under the definite price clause is $4.25 and under the indefinite price escalator clause is $5.00.

In all three examples, assume that section 121(e) and 105(b)(3)(A) limit indefinite price escalator provisions in the affected contracts from exceeding $4.00,[24] that the

[24] The price cap imposed by section 121(e) is calculated using a formula found in section 105(b)(3)(A). The cap is the higher of the contract price on the date of enactment of the NGPA, adjusted for inflation, or the section 102 price with an inflation and growth adjustment. The $4.00 price cap in the hypothetical above assumes that $4.00 is the higher of either of these two alternatives.

gas in all of the examples is otherwise deregulated under section 121(a)(3), and the gas is not sold under a rollover contract.[25]

Under the Commission's Order No. 406, only gas in Example 1 would be subject to the price cap and the producer could collect only $4.00. This is so because the price escalator clause increased the price of gas to above the $1.00 threshold to be deregulated. That is, the cap only applied if the indefinite clause was necessarily used to deregulate the gas. In Examples 2 and 3, the price cap would not be applicable under the final rule's approach because the gas would have been deregulated if it were priced under the definite clause, (whether it was in fact priced under the definite price clause was irrelevant).

Under the approach urged by the petitioners and now adopted by the Commission, the price computed under the indefinite price escalator clause would be limited to $4.00 in both Examples 1 and 2 because in these examples the gas is sold at a "price established under an indefinite price escalator clause." It would be irrelevant which clause caused the gas to go above the $1.00 threshold; it would only be relevant to determine if the intrastate gas otherwise deregulated is priced under an indefinite price clause.

The Commission notes that in Example 3 the gas could be sold for $4.25, that is, not subject to the section 121(e) limitation, since the price is established under a definite clause, not an indefinite clause. The limitation in section 121(e) is a limitation only on the operation of *indefinite* price escalator clauses in an existing or successor to an existing intrastate contract, not a limitation on the operation of definite escalator clauses. Moreover, there is no limitation imposed by the NGPA on the parties to a deregulated intrastate contract agreeing to a definite price which is in

[25] Indefinite price escalator clauses in contracts for rollover gas are never subject to the limitation imposed by section 121(e).

excess of the limitation on *indefinite* escalators under section 121(e).[26] The only limitation imposed by section 121(e) is on the operation of indefinite price escalator clauses in contracts for certain deregulated intrastate gas. If, however, the producer in Example 3 prices the gas under the indefinite clause at $5.00, then the limitation would apply and the gas could not be sold above $4.00.

The arguments marshalled by the six petitioners on rehearing have persuaded the Commission that the section 121(e) limitation on indefinite price escalator clauses was intended to be more broadly applicable than had been originally construed in Order No. 406.

Petitioners generally assert that under NGPA section 121(e) the limitation on indefinite escalator clauses is applicable commencing January 1, 1985, to gas otherwise deregulated by section 121(a)(3) whenever the price paid is established under an indefinite escalator clause in the contract. The petitioners assert that such gas is being sold at a price "established under" an indefinite price escalator clause for purposes of the section 121(e) limitation.

Petitioners point out that the Conference Committee Report indicates that the section 121(e) limitation applies to indefinite price escalator provisions in *all* existing and successor contracts for intrastate gas which is deregulated under section 121(a). The Conference Report states:

> This special rule [in section 121(e)] limits the operation of indefinite price escalator clauses in existing intrastate contracts for which the contract price on

[26] Section 105(b)(3)(C) prohibiting contract modifications in certain intrastate contracts does not prevent parties to an intrastate contract from renegotiating a price higher than the section 105(b)(3)(B) limitation if the price is determined under a *definite* price clause. Section 121(e) makes section 105(b)(3) applicable only if gas is sold under a price established under an *indefinite* price escalator clause. Thus, if the parties renegotiate the contract and price the gas under a definite price clause, section 121(e) would never trigger the section 105(b)(3) limitation on indefinite price clauses.

> December 31, 1984 is higher than $1.00 per MMBtu's so that the contract price may not exceed the new gas ceiling price as of January 1, 1985, adjusted by the monthly equivalent of the annual inflation adjustment factor, plus 3.0 percentage points. This limitation applies to natural gas which is deregulated solely as a result of qualifying as an existing contract or a successor to an existing contract in excess of $1.00 per million Btu's on or before December 31, 1984.

H. Rep. 95-1752, at 83 (1978).

Petitioners also draw support in the September 8, 1978, letter from Charles B. Curtis, then Chairman of the Commission, to the Honorable Henry M. Jackson. The letter states that "section 105(b)(3) defines the pricing policy to be effective in January, 1985 where the contract price as defined in section 105(c) is increased as a result of an indefinite price escalator clause." Finally, the statement of the floor manager of the NGPA, Congressman Dingell, that:

> [t]he conferees were concerned that, following deregulation, the operation of indefinite price escalator clauses in existence on May 3, 1978, and contained in certain existing intrastate contracts, could operate to increase rapidly intrastate gas prices following deregulation [and that] section 105(b)(3)(A) puts a lid on that escalation.[[27]]

serves to buttress further the petitioners' postion.

Accordingly, the Commission has granted petitioners' request for rehearing on this issue, and has made conforming technical amendments, including deleting § 271.506(a) from the regulations. Thus, the section 121(e) and section 105(b)(3)(A) limitation applies to any indefinite price escalator clause in an existing or successor intrastate contract that is, or would have been in excess of $1.00 per MMBtu on December 31, 1984.

[27] 124 Cong. Rec. H. 13117-18 (October 14, 1978).

C. Other Issues

Certain other issues were raised and certain technical and conforming amendments need to be made in the final rule. These other issues and corrections follow:

(1) Interim Collections

One petitioner requested that the Commission clarify its intent with regard to the negotiation of an interim rate. The final rule provides that:

> an agreed-upon rate will govern interim collections. However, if the parties are entitled to renegotiate the price upon deregulation, they need do so only once. The agreed-upon interim deregulated price may continue to serve as the deregulated price, once the gas is ultimately determined to be deregulated.

49 FR 46877 (Nov. 29, 1984).

In response to the petitioner's request, the Commission clarifies that the agreed-upon interim rate may be established by whatever means is agreeable to the parties. The Commission does not intend to interfere with contract rights applicable to deregulated gas. *See generally Pennzoil Co.* v. *FERC*, 654 F.2d 360, 375 (5th Cir. 1981), *cert. denied,* 454 U.S. 1142 (1982). Accordingly, the Commission acknowledges that the deregulated rate collected as an interim payment may be established without renegotiation of some separate and interim rate where contract authority governing interim collection upon deregulation is in place.

(2) Affidavit for Section 103 Dedication
and Depth Requirement

One petition requested clarification of the suggestion made by the Commission that producers provide pipelines with an affidavit, upon request, that certain gas meets the dedication and depth requirements of NGPA section 121(a)(2) for certain section 103 gas. *See* 49 FR 46877 (Nov. 29, 1984). The petitioner's concern is that some pipeline purchasers may use the affidavit requirement in order to delay payment of the deregulated price.

The Commission believes that in many cases the pipeline will already possess the needed information on the dedication and depth of the section 103 well. In those cases where the pipeline does not already possess the needed information, the simple affidavit procedure serves a useful purpose. The Commission does not wish this procedure to be used as a vehicle to delay payment, however. The Commission therefore grants the clarification requested that the pipeline should not delay payment of the deregulated price until the affidavit is received. If it is subsequently determined that the gas that is the subject of the affidavit is not deregulated, the producer would, of course, be required to refund the difference between the deregulated price and the otherwise applicable maximum lawful price with interest.

(3) Technical Corrections

The Commission is making several minor technical corrections either to improve the clarity of its regulations, to correct inaccurate cross-references, or to make the regulations conform to other changes in the Commission's regulations being made on rehearing.

List of Subjects in 18 CFR Parts 270 through 273

Natural gas, Incentive prices.

In consideration of the foregoing as well as the reasons set forth in the final rule of this docket, the Commission amends Parts 270 through 273, Chapter 1, Title 18, Code of Federal Regulations, as set forth below.

By the Commission.

Kenneth F. Plumb,
Secretary.

PART 270—[AMENDED]

1. The authority citation for Part 270 continues to read as follows:

Authority: Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432.

In § 270.202, paragraph (h) is revised to read as follows:

§ 270.202 Resales.

* * * * *

(h) *Special rules for percentage-of-proceed sales.*

(1) In the case of natural gas purchased by a reseller in a percentage-of-proceeds sale, the reseller may determine the maximum lawful price for the resale under paragraph (a)(1) of this section. If the reseller so determines his maximum lawful price, any sale to such reseller in such percentage-of-proceeds sale shall not be treated as a first sale for purpose of this subchapter.

(2) The price of natural gas sold under a percentage-of-proceeds contract subject to subparts E and F of Part 271 is deregulated if the price paid on the resale contract is deregulated under Part 272.

PART 271—[AMENDED]

3. The authority citation for Part 271 continues to read a follows:

Authority: Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432.

4. In § 271.502, paragraph (b) is revised to read as follows:

§ 271.502 Maximum lawful prices.

* * * * *

(b) The maximum lawful price per MMBtu for natural gas delivered in any month which is:

(1) gas to which the subpart applies;

(2) gas for which the price paid exceeds $1.00 per MMBtu on December 31, 1984 (or would exceed $1.00 per MMBtu if sold on such date); and

(3) gas which is sold at a price established under an indefinite price escalator clause as defined in section 105(b)(3)(B) of the NGPA;

shall be the higher of the price specified for Subpart E of Part 271 in Table I of section 271.101(a) or the contract price per MMBtu on November 9, 1978, adjusted for inflation in accordance with § 271.102 of this part.

§ 271.506 [Removed]

5. Section 271.506 is removed.

PART 272—[AMENDED]

6. The authority citation for Part 272 continues to read as follows:

Authority: Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432.

7. In § 272.103, paragraphs (a)(3) and (a)(3)(ii) are revised to read as follows:

§ 272.103 Definitions.

(a) * * *

(3) Natural gas sold under an existing intrastate contract, any successor to an existing intrastate contract, or any intrastate rollover contract, if:

(i) * * *

(ii) in the case of any existing or successor intrastate contract,

(A) the price paid for the last deliveries of such natural gas occurring on December 31, 1984, or, if no deliveries occurred on such date, the price that would have been paid if deliveries occurred on such date is higher than $1.00 per MMBtu, and

(B) such gas is not subject to the maximum lawful price in section 271.502(b); or

(iii) * * *

PART 273 – [AMENDED]

5. Section 273.204(a)(1)(iv) is amended by removing the words "§ 272.103(a)(3)" and inserting, in their place, the words "§ 272.103(a)(2)(ii)."

APPENDIX G

Section 101(b)(5) of the Natural Gas Policy Act of 1978, 15 U.S.C. 3311(b)(5), provides:

(b) Rules of general application

* * * * *

(5) Sales qualifying under more than one provision

If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

Section 107(c)(5) of the Natural Gas Policy Act of 1978, 15 U.S.C. 3317(c)(5), provides:

(c) *Definition of high-cost natural gas*

For purposes of this section, the term "high-cost natural gas" means natural gas determined in accordance with section 503 of this title [15 U.S.C. 3413] to be –

* * * * *

(5) produced under such other conditions as the Commission determines to present extraordinary risks or costs.

Sections 121 and 122 of the Natural Gas Policy Act of 1978, 15 U.S.C. 3331 and 3332, provide:

SEC. 121 [15 U.S.C. 3331]. ELIMINATION OF PRICE CONTROLS FOR CERTAIN NATURAL GAS SALES

(a) GENERAL RULE. – Subject to the reimposition of price controls as provided in section 122 [15 U.S.C. 3332], the provisions of subtitle A respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e), cease to apply effective January 1, 1985:

(1) NEW NATURAL GAS. – New natural gas (as defined in section 102(c) [15 U.S.C. 3312]).

(2) NEW, ONSHORE PRODUCTION WELLS.—Natural gas produced from any new, onshore production well (as defined in section 103(c) [15 U.S.C. 3313]), if such natural gas—

(A) was not committed or dedicated to interstate commerce on April 20, 1977; and

(B) is produced from a completion location which is located at a depth of more than 5,000 feet.

(3) INTRASTATE CONTRACTS IN EXCESS OF $1.00.—Natural gas sold under an existing contract, any successor to an existing contract, or any rollover contract, if—

(A) such natural gas was not committed or dedicated to interstate commerce on the day before the date of the enactment of this Act; and

(B) the price paid for the last deliveries of such natural gas occurring on December 31, 1984, or, if no deliveries occurred on such date, the price would have been paid had deliveries occurred on such date is higher than $1.00 per million Btu's.

(b) HIGH-COST NATURAL GAS.—Effective beginning on the effective date of the incremental pricing rule required under section 201 [15 U.S.C. 3341], the provisions of subtitle A respecting the maximum lawful price for the first sale of natural gas shall cease to apply to the first sale of high-cost natural gas which is described in section 107(c) (1), (2), (3), or (4) [15 U.S.C. 3317(c) (1), (2), (3), or (4)].

(c) NATURAL GAS PRODUCED FROM 5,000 OR LESS.—Effective beginning July 1, 1987, or, if later, the date of expiration of any price controls reimposed under section 122 [15 U.S.C. 3332], the provisions of subtitle A respecting the maximum lawful price for any first sale of natural gas shall, except as provided in subsection (d), cease to apply to any first sale of natural gas produced from any new, onshore production well (as defined in section 103(c) [15 U.S.C. 3313]), if such natural gas—

(1) was not committed or dedicated to interstate commerce on April 20, 1977; and

(2) is produced from a completion location which is located at a depth of 5,000 feet or less.

(d) EXCLUSION OF CERTAIN ALASKA NATURAL GAS.—The provisions of subsections (a) and (c) shall not apply to any natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportation system approved under the Alaska Natural Gas Transportation Act of 1976.

(e) LIMITATION ON INDEFINITE PRICE ESCALATORS.—Natural gas which is not subject to maximum lawful prices under subtitle A solely by reason of subsection (a)(3) and which is sold under any existing contract or successor to an existing contract at a price established under an indefinite price escalator clause (as defined in section 105(b)(3)(B) [15 U.S.C. 3315(b)(3)(B)]) shall be subject to the provisions of section 105(b)(3) [15 U.S.C. 3315(b)(3)].

SEC. 122 [15 U.S.C. 3332]. STANDBY PRICE CONTROL AUTHORITY.

(a) REIMPOSITION OF PRICE CONTROLS.—The President, in accordance with subsection (c)(1), or the Congress, in accordance with subsection (c)(2), may reimpose maximum lawful prices for first sales of natural gas to which section 121(a) [15 U.S.C. 3331 (a)] applies and delivery of which occurs after the effective date of the reimposition of such maximum lawful prices.

(b) LIMITATIONS.—A reimposition of maximum lawful prices under this section—

(1) may not take effect earlier than July 1, 1985, nor later than June 30, 1987; and

(2) shall remain in effect for a period of 18 months.

(c) PROCEDURE FOR REIMPOSING PRICE CONTROLS.—For purposes of this section—

(1) PRESIDENTIAL REIMPOSITION.—Any exercise of authority by the President under subsection (a) shall be by written order issued after May 31, 1985, and, subject to subsection (b), shall take effect for the first month beginning after the first 30 calendar days of continuous session of Congress (as determined in accordance with section 507(b) [15 U.S.C. 3417(b)]) after a copy of such order has been submitted to each House of the Congress unless during such 30 calendar days of continuous session of Congress, the Congress adopts a concurrent resolution of dispproval described in section 507(c)(1) [15 U.S.C. 3417(c)(1)].

(2) CONGRESSIONAL REIMPOSITION.—Any exercise of authority by the Congress under subsection (a) shall be by the adoption of a concurrent resolution after May 31, 1985, described in section 507(c)(2) [15 U.S.C. 3417(c)(2)] and, subject to subsection (b), shall take effect for the first month beginning after the date of the adoption of such resolution.

(d) MAXIMUM LAWFUL PRICES APPLICABLE UNDER REIMPOSITION OF PRICE CONTROL.—If maximum lawful prices are reimposed under this section on first sales of natural gas to which section 121(a) [15 U.S.C. 3331(a)] applies, the maximum lawful price under this section for any first sale of such natural gas delivered during any month shall be—

(1) except as provided in paragraph (2), the maximum lawful price, per million Btu's, computed for such month under section 102 [15 U.S.C. 3312] (relating to new natural gas); and

(2) the maximum lawful price, per million Btu's, computed for such month under section 103(b)(2) [15 U.S.C. 3313(b)(2)] (relating to new, onshore production wells 5,000 feet or less in depth), in the case of

natural gas produced from any new, onshore production well (as defined in section 103(c) [15 U.S.C. 3313(c)]) if such natural gas—

(A) was not committed or dedicated to interstate commerce on April 20, 1977; and

(B) is produced from a completion location which is located at a depth of 5,000 feet or more.

(e) ALLOWANCE FOR STATE SEVERANCE TAXES AND CERTAIN PRODUCTION-RELATED COSTS.—A price may exceed the maximum lawful price applicable for such natural gas under this section to the same extent as is provided under section 110 [15 U.S.C. 3320] with respect to maximum lawful prices under subtitle A.

(f) LIMITATION.—Maximum lawful prices may be reimposed only once under this section.

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40466

Nos. 87-363 and 87-364

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION,

Petitioner,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,

Respondents.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*

Petitioners,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[Counsel for Producer Respondents are listed inside]

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QUESTION PRESENTED

Whether a regulation adopted by the Federal Energy Regulatory Commission is valid under the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.* ("NGPA"), where the regulation provides that natural gas qualifying for an incentive price regulated category under the NGPA is not subject to such incentive regulated prices and cannot be treated as falling in the regulated category if it also qualifies in any category eligible for price deregulation?

LIST OF PARTIES

The producer respondents ("Producers") joining in this Brief in Opposition are as follows:

Martin Exploration Management Company

Amoco Production Company

Arco Oil and Gas Company

BHP Petroleum Company Inc.

Chevron U.S.A., Inc.

Cities Service Oil and Gas Corp.

Exxon Corporation

Grace Petroleum Corporation

Independent Oil and Gas Association of West Virginia

Ohio Oil and Gas Association

Pennzoil Company

Phillips Petroleum Company

Placid Oil Company

Shell Offshore, Inc.

Shell Western E&P, Inc.

Union Oil Company of California

Union Pacific Resources Company

Pursuant to Rule 28.1, we include as an addendum hereto a listing naming all parent companies and non-wholly-owned subsidiaries and affiliates of the corporate respondents joining in this brief.

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Public Serv. Comm'n of New York v. Mid-Louisiana Gas Co., 463 U.S. 319 (1983) 2,11,14

STATUTES AND REGULATIONS:

Administrative Procedure Act, 5 U.S.C. § 706(2)(c) 13

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OPINIONS BELOW

Petitioners seek review of the decision of the U.S. Court of Appeals for the Tenth Circuit in *Martin Exploration Management Co. v. FERC*, 813 F.2d 1059 (10th Cir. 1987) ("*Martin*"). The Court of Appeals affirmed in part and reversed in part Federal Energy Regulatory Commission ("Commission") Order No. 406 issued in FERC Docket Nos. RM84-14-000 et al., FERC Stats. & Regs. (Regs. Preambles 1982-85) (CCH) ¶ 30,614 (November 16, 1984) and Order No. 406-A on rehearing, FERC Stats. & Regs. (Regs. Preambles 1982-85) (CCH) ¶ 30,622 (December 21, 1984). Order No. 406-B, denying rehearing of Order No. 406-A, 30 FERC (CCH) ¶ 61,152 (February 15, 1985), is not pertinent to the issues raised in the petitions.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 101(b)(5) of the NGPA, 15 U.S.C. § 3311(b)(5), provides:

(b) *Rules of General Application.*— . . . .

. . . .

(5) *Sales qualifying under more than one provision.*—If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas,

> the provision which could result in the highest price shall be applicable.

Title 18 C.F.R. § 270.208 adopted in Commission Order No. 406 provides:

> First sales of natural gas that is deregulated natural gas as defined in § 272.103(a) is price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

This case also involves Sections 107(c)(5), 108 and 121 of the NGPA, 15 U.S.C. §§ 3317(c)(5), 3318 and 3331 (*see* Commission Pet. App. at 127a-131a).[1]

STATEMENT OF THE CASE

Partial Decontrol Under NGPA Section 121. The NGPA, 15 U.S.C. §§ 3301-3432, was enacted by Congress on November 9, 1978. The NGPA was carefully negotiated compromise legislation enacted only after long debate and discussion between representatives of producing and consuming states. The NGPA was intended to bring about a solution to what had become chronic shortages of natural gas in interstate commerce. Under the NGPA compromise, Congress provided a statutory means for setting of maximum lawful prices for gas in a number of different categories. *See generally Public Serv. Comm'n of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 325-

[1] App. refers to the Appendices to the Commission's Petition filed in No. 87-363 on August 31, 1987.

38 (1983) ("*Mid-Louisiana*"). Natural gas sold in intrastate commerce was brought under price controls for the first time as of the NGPA's effective date, December 1, 1978. Section 121 of the NGPA, 15 U.S.C. §3331, provided for price decontrol of certain categories of gas on differing dates. Section 121(a) of the NGPA removed price controls as of January 1, 1985, for the following categories of natural gas:

> (1) New natural gas as defined in Section 102(c) of the NGPA.
>
> (2) Natural gas produced from new onshore production wells as defined in Section 103(c) of the NGPA if that gas was not committed or dedicated to interstate commerce on April 20, 1977, and is produced from a completion location located at a depth of more than 5,000 feet.
>
> (3) Natural gas sold under an existing contract, any successor to an existing contract or any rollover contract if (a) the gas was not committed or dedicated to interstate commerce on November 8, 1978, and (b) the price paid or payable on December 31, 1984, was higher than $1.00 per million Btu's.

15 U.S.C. § 3331(a). Other categories of gas remain subject to price controls indefinitely.

Notice of Proposed Rulemaking. Anticipating the January 1, 1985, partial decontrol of certain intrastate gas and gas produced from a large portion of the "new wells" commenced on or after February 19,

1977,[2] the Commission issued a Notice of Proposed Rulemaking in Docket No. RM84-14-000 on September 13, 1984, 49 Fed. Reg. 36,399, App. 34a-60a. The Commission proposed rules designed to implement NGPA Section 121(a) and to provide for price decontrol of the categories of gas scheduled to be decontrolled as of January 1, 1985. In the Notice the Commission first announced its tentative conclusion that where gas qualifies in an incentive price category and also qualifies for deregulation, where the regulated price may be higher than the deregulated price, the regulated prices would no longer apply. App. 43a-45a.

Order No. 406. On November 16, 1984, Order No. 406 was issued (App. 61a-103a). The Commission concluded that gas that qualifies in a still-regulated incentive price category must be decontrolled if such gas also qualifies in a decontrolled category (App. 73a-82a). The Commission denied producer claims of reliance upon the incentive prices in the higher still-regulated price categories despite numerous uncontradicted statements in comments and at the hearing of such reliance. (App. 79a-81a).

The primary categories which are still regulated and which might afford higher prices to producers than deregulated treatment are NGPA Sections 107(c)(5) and 108, 15 U.S.C. §§ 3317(c)(5) and 3318. Section 107(c)(5) allows the Commission to establish incentive prices for high cost gas produced under conditions that the Commission determines present extraordinary risks or costs. The Commission has determined that gas produced from designated tight formations subject to a "negotiated contract price" may be priced at up to two hundred percent of the maximum lawful price specified for NGPA § 103(b)(1) gas.[3] Stripper well gas qualifying under Section 108 is gas produced from low volume wells which are frequently in the later stages of depletion, which would be abandoned prematurely leaving producible gas in the reservoir without the incentive price made available by Congress. The stripper well price is higher than the NGPA Section 102 new gas price and is designed to provide incentives for the fullest possible recovery of producible reserves. *See* 18 C.F.R. §§ 271.101, 271.703(a) and 271.801-271.807. The Commission decided that a new tight formation gas category determination also is necessarily a Section 102(c) or 103 determination, even if the producer never sought a determination that the gas in question qualified in Sections 102 or 103 (App. 81a-82a).[4]

Order No. 406-A. As to the issue raised in the current petitions, on rehearing the Commission reaffirmed the position stated in Order No. 406 (App.

[2] "New well" is defined in NGPA § 2(3), 15 U.S.C. § 3301(3), as a well whose surface drilling began on or after February 19, 1977, or which was deepened by at least 1,000 feet after that date.

[3] Interim Rule Covering High-Cost Natural Gas Produced From Tight Formations, 45 Fed. Reg. 13,414, FERC Stats. & Regs. (Regs. Preambles 1977-81) (CCH) ¶ 30,130 (February 28, 1980) ("Interim Rule"); Order No. 99, 45 Fed. Reg. 56,034, FERC Stats. & Regs. (Regs. Preambles 1977-81) (CCH) ¶ 30,183 (August 22, 1980).

[4] We do not discuss the second question raised in the Commission's petition. The Commission does not argue that standing alone it would warrant review. (Comm. Pet. at 15 n.19)

107a-116a). The new regulations were effective January 1, 1985.

Producers sought judicial review, and the Court of Appeals issued the *Martin* opinion now sought to be reviewed (App. 1a-31a).

SUMMARY OF ARGUMENT

This is a case of statutory construction. Section 101(b)(5), 15 U.S.C. §3311(b)(5), of the NGPA is the rule of construction to be applied when more than one provision of Title I applies. That section provides that:

> (b) *Rules of General Application.*— . . . .
>
> . . . .
>
> (5) *Sales Qualifying Under More than One Provision.*—If any gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

Thus, the language of the NGPA is clear and unambiguous. If the gas is exempted under Section 121 of Subtitle B from the application of a maximum lawful price (i.e., deregulates) and remains qualified for a regulated maximum lawful price under another provision of Title I, the statute permits collection of the highest price for which the gas is eligible.

The Commission and its supporters seek to have the Court disregard the plain language of Section

101(b)(5). Where Congress has spoken on an issue, its pronouncement is mandatory as the controlling law. Statutes are to be construed in a manner most consistent with common understanding. Instead, petitioners engage in sophistry in order to arrive at a preconceived result plainly inconsistent with Congressional intent. The Commission's construction is at odds with the language, legislative history and Congress' intent in adopting the NGPA.

This case presents a narrow statutory construction issue of limited and ever-declining applicability. Dual category gas constitutes an unquantified but very small percentage of the nation's natural gas supplies. Dual category gas covered by commitments to purchase at ceiling prices is a much smaller volume. None of the traditional grounds for granting certiorari are present here. The Court's attention is simply not warranted.

The decision of the U.S. Court of Appeals for the Tenth Circuit thoroughly and correctly analyzed the issues and invalidated Section 270.208 of the Commission's regulations as inconsistent with Section 101(b)(5) of the NGPA. The writs sought in these cases should be denied.

REASONS FOR DENYING THE WRIT

Introduction. In this case the Commission has sought to manufacture ambiguity where none exists in a very specific controlling statutory command. Generally, we refer the Court to the Tenth Circuit's *Martin* opinion for its cogent treatment of the arguments advanced by the Commission. A review of the *Martin* opinion leads to the conclusion that Section 270.208 of the Commission's regulations cannot stand. Con-

gress spoke directly on the issue of regulatory treatment under the NGPA for gas falling into multiple price categories, specifically including the situation that prevails when one of the multiple price categories is eligible for price decontrol. Section 101(b)(5) states that the price category that will result in the highest price applies. This result is consistent with Congress' expressly stated intent, the legislative history of the NGPA and Congress' overall objective of providing continuing incentives for production of high cost Section 107(c)(5) gas and Section 108 gas in the later stages of depletion even during and after a transition to a field market controlled more by market forces than by regulation. In contrast, the Commission's result can withstand neither plain meaning analysis nor a review for reasonableness.

Statutory language. Turning first to the statutory language, Section 101(b)(5) seems clear on its face that if gas qualifies under multiple price categories whether regulated or deregulated, "the provision which could result in the highest price shall be applicable." But rather than look at Section 101(b)(5), the other general rules of application in Section 101(b) and Section 121 of the NGPA as a consistent whole, the Commission either ignores or seeks to alter this controlling subsection in an effort to obtain the result that regulated incentive prices may no longer be collected under applicable maximum lawful price or similar clauses.

"Exemption" Refers to Decontrolled Categories. The first issue involves the meaning of "exemption from such a price." As used, this is a very clear reference to deregulated categories, since it immediately follows "any maximum lawful price" and is parallel with a

similar "exemption" reference in Section 101(b)(9) of the NGPA (App. 13a-15a).[5] Thus the language of NGPA Section 101(b)(5) is clear and prohibits adoption of any rule mandating involuntary deregulation for incentive price regulated gas. The rule was accurately described in the primary source of legislative history for the NGPA, the Conference Report:

> The conference agreement provides that if natural gas qualifies under more than one price category, the provisions that permit the seller *to obtain* the highest price applies.[6]

Moreover, in one of its own prior proceedings the Commission itself found that "[u]nder Section 101(b)(5), gas qualifying under one or more categories receives the highest maximum lawful price for which it is eligible including a deregulated price, if applicable."[7]

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[5] Petitioners in both cases appear to have abandoned any contention that "exemption" does not refer to deregulated categories.

[6] H.R. Rep. No. 1752, 95th Cong., 2d Sess. 74, *reprinted in* 1978 U.S. Code Cong. & Admin. News 8983, 8991 (emphasis added) ("Conference Report").

[7] Interim Rule , 45 Fed. Reg. at 13,422-23.

New York, et al. also suggest (Pet. at 11) that the Commission construction is entitled to deference on the ground that it is a contemporaneous construction of the statute. The statement is incorrect. The current Commission interpretation wasn't even invented until 1984 and was first disclosed in the notice of proposed rulemaking in this case. See letter from Commission Chairman Curtis to Senator Jackson forwarding the Commission's Section by Section Analysis and the Analysis, mimeo at 22, (Sept. 8, 1978) for a differing contemporaneous interpretation, *reprinted in* Natural Gas Policy Act Information Service

"Could" Refers to Real World Prices. Initially, the Commission focuses on "could" in the phrase in Section 101(b)(5) "the provision which *could* result in the highest price shall be applicable." This argument seeks to transform the meaning of "could" from "was, should be or would be able"[8] to the realm of theoretical possibilities. Since a deregulated price could in theory be infinitely high, that option must always control, says the Commission. The Court of Appeals dealt effectively with the position, finding that reference to the real world is necessary (App. 15a-16a). The Court of Appeals correctly found that the "could" theory of the Commission would render meaningless a statutory provision that deals with two possibilities by forever negating one of those possibilities. The result is plainly inconsistent with this Court's own prior comments in *Mid-Louisiana* concerning Section 101(b)(5):

> The statute evinces careful thought about the extent to which producers of "old gas"—gas already dedicated to interstate commerce before passage of the NGPA—would be able to enjoy incentive pricing . . . . However, § 101(b)(5) of the Act specifies that if a volume of gas fits into more than one category, "the provision which could result in the highest price shall be applicable." Thus, old gas that would be subject to the old NGA vintaging rules may be entitled to a higher rate if it falls within one or more of the

(FPAS) ¶ 101:220, at 2. *Compare* Statement of Senator Jackson, *id.* ¶ 101:230, at 1, 124 Cong. Rec. S15020-21 (daily ed. Sept. 12, 1978).

[8] Webster's New International Dictionary, unabridged (2d ed. 1954).

> other Title I categories, in particular §107 (high-cost natural gas) and §108 (stripper well gas). Whether or not the old NGA rates were in fact sufficient to stimulate some production from those categories, Congress concluded that the nation's energy needs justified the higher, statutory rates.[9]

The Court of Appeals also cited a number of other decisions reading Section 101(b)(5) in a common sense manner contrary to the Commission's analysis of "could".[10] The use of that term in Section 101(b)(5) designates as the applicable price category the category that actually results in the highest prices payable to the producer or first seller.

Congress would not have seized upon a subtlety so obscure as the Commission's current interpretation of "could" had it intended that deregulated treatment must always apply to dual category gas eligible for decontrol. The NGPA was "the product of a conference committee's careful reconciliation" of "two strong, but divergent, responses to the natural gas shortage" *Mid-Louisiana*, 463 U.S. at 331, a compromise that "took into account the conflicting interests of producers and consumers." *Pennzoil Co. v. FERC*, 645 F.2d 360, 379 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) ("Pennzoil"). The NGPA was "Congress' solution to the necessity of encouraging production and exploration of new natural gas sources and maintaining adequate supplies of natural gas in the interstate market." *Oklahoma v. FERC*, 661 F.2d 832, 834 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982). The closely negotiated NGPA compromise

[9] 463 U.S. at 334-35 (note omitted).

[10] App. 12a-13a n.8.

came about only after 18 months of legislative battles. It contains many provisions favorable to the interests of consuming states, which are balanced by other provisions favoring producing producing states.

Large areas of detail were withdrawn from the Commission's discretion in favor of closely negotiated specific rules expressed in as clear language as could be written. It is not surprising, therefore, that Congress foresaw the very issue now under review. Congress never would have drafted Section 101(b)(5) as it did to provide that the higher of two potentially applicable provisions will apply if only one of the two provisions could possibly apply. One simply does not draft a statute providing for "the higher of A or B" if B is always higher. If that were the intent, Congress simply would have stated that the Section 101(b)(5) rule would apply only as between multiple regulated categories and prior to deregulation. Very specific terms mandating only decontrolled treatment for gas eligible for decontrol would have been used. No such qualifications were adopted in Section 101(b)(5), Section 121 or elsewhere.

The Commission next argues that the Court of Appeals' reading of Section 101(b)(5) would entangle the Commission in contract construction, an anomaly in a statute otherwise concerned only with ceiling prices (Comm. Pet. at 15-6). This is a straw-man argument. The *Martin* court does not construe the statute to require constant reference to contract provisions. Indeed, the Commission lacks jurisdiction over many such contract disputes, *Pennzoil*, 645 F.2d at 380-82. Section 101(b)(5) quite simply gives the producer the benefit of the highest of all potentially

applicable maximum lawful price and decontrolled categories. There is no "glaring anomaly".

Section 121 Does Not Nullify Section 101(b)(5). The Commission and supporting parties argue that "deregulation is mandatory" and that the Court of Appeals' result is inconsistent with an overall single objective of the NGPA to move toward a deregulated field market (Comm. Pet. at 16-8, New York Pet. at 7). There are a number of answers to these contentions (App. 11a, 13a n.9). First, general arguments about overall objectives cannot override contrary statutory language.[11] Second, the Commission's argument recognizes, as it must, that the NGPA was compromise legislation embodying a mix of conflicting objectives. While a less regulated field market was an important eventual objective, so was the immediate equalization of access to field markets by both interstate and intrastate purchasers. Supply elicitation was another primary and continuing objective of the NGPA. Continued incentive pricing for Section 107(c)(5) high-cost gas and Section 108 stripper gas was plainly another of Congress' supply eliciting objectives.

Third, the argument that "deregulation is mandatory" simply begs the question. There is no dispute that gas eligible for decontrol is in fact eligible for decontrol. Yet gas which is eligible for continued incentive prices is with equal force still eligible for those

[11] Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986) ("Federal Reserve System"). Nor can general rulemaking authority do so. The Commission argues the contrary (Comm. Pet. at 18 n.21). NGPA rules must be consistent with the statute. NGPA Sections 501(a) and (b), 15 U.S.C. §§ 3411(a) and (b); 5 U.S.C. § 706(2)(C).

price incentives under the NGPA if that treatment results in a higher price. Section 121 speaks only of decontrol of named *categories* of gas.[12] The Commission's interpretation is unreasonable in any event in light of the Conference Report at 92: "The conference agreement does not provide for deregulation of any natural gas production not specifically enumerated in this section."[13]

Fourth, the argument that the Court of Appeals' result could cause frequent switches from regulated to deregulated category treatment is both factually erroneous and beside the point. Producers committed large investments to drill, fracture and equip wells producing high cost tight formation gas and to maintain or enhance production from stripper wells in reliance on continued availability of the NGPA price incentives in these categories. Producers have been unable to negotiate new contracts in the market at the NGPA incentive category price ceilings since early to mid-1983. The relatively few producers able to benefit from regulated treatment through older contracts with ceiling price clauses covering still-regulated incentive category gas will not be making frequent switches between deregulated and regulated treatment in the current and foreseeable energy markets. Contrary to the Commission's suggestion, this is not an ever-growing problem. Gas is being depleted as it is produced each day. Contracts are being renegotiated daily. Estimates of the cost of the Court of Appeals' decision are substantially overstated by petitioners.

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[12] Mid-Louisiana, 463 U.S. at 336 n.14.

[13] 1978 U.S. Code Cong. and Admin. News at 9009.

New York, et al. persist in the argument that Section 101(b)(5) of the NGPA is not applicable, arguing that Section 121 makes *all* of subtitle A of Title I of the NGPA inapplicable to deregulated gas (New York Pet. at 8-9). The Commission itself expressly "does not renew" this argument (Comm. Pet. at 13 n. 19). The Court of Appeals properly rejected it (App. 10a-16a). This construction would render not only Section 101(b)(5) but other "rules of general application" meaningless. It would negate applicability of Section 101(b)(5) to deregulated gas even though Section 101(b)(5) expressly refers to deregulated gas. Section 101(b)(5) definitely applies to dual category gas at least in its capacity as regulated gas. Finally, not even the language of Section 121 supports the argument. Only the provisions of subtitle A "*respecting the maximum lawful price* for the first sale of each of the following categories" are made inapplicable, not all of subtitle A. In Section 121, Congress intended to eliminate only price controls for the named categories; it did not intend or state that other rules of general application are repealed.[14]

Category Selection. The Commission argues that the statute denies the producer any choice about applicable price categories and dictates that the *only* ap-

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[14] The Commission (Comm. Pet. at 13 n.19) and New York (Comm Pet. at 6 n.3) repeat a claim from Order No. 406 that Producers have changed their tune regarding Section (101)(b)(5). The Pennzoil Co. comments quoted at App. 74a n.10 assert only that deregulated treatment for a Section 102 well which also qualifies as a tight formation well is an available option which cannot be denied by the Commission (R. 3179-84). The issue was resolved in a similar manner in the Tight Formations Gas Interim Rule, FERC Stats. & Regs. (Regs. Preambles 1977-81) (CCH) ¶ 30,130 at 30,917 (1980).

plicable category is the category which "could result in the highest price." (Comm. Pet. at 18-21). This argument is but a variant of the "could" sophistry. The Commission now concedes that it is referring only to situations where natural gas has actually been qualified in both a still-regulated incentive price category and in a category eligible for decontrol, and repeats in different words its argument that in theory, deregulated prices must always control because they "could" be higher. The statute plainly and simply assures producers that when multiple categories could apply, the one that will result in the highest price does apply. Contrary to the Commission's straw-man argument (Comm. Pet. at 19-20), this construction imposes absolutely no burden on the agency to require the filing of reports and contracts in order to identify applicable categories. The Commission's historic policy of enforcement of NGPA prices by audits and actions on complaints is fully adequate. Compliance assessments will simply be based on the most favorable category from time to time. Producers are best equipped to determine in practice which category results in the highest price and is therefore applicable.[15]

[15] The Commission's attempt to distinguish the statement at page 83 of the Conference Report that stripper gas could be sold "subject to the provisions of Section 108 rather than taking deregulated treatment" (Comm. Pet. at 21 n.24) is not distinguishable on the basis cited by the Commission. Section 121(e) of the NGPA refers not to an overlap of two regulated categories, but to the relationship between Section 108 pricing and the operation of NGPA Section 105(b)(3), 15 U.S.C. § 3315(b)(3). The latter is *not* a separate regulated price category, but a post-decontrol limitation on the operation of indefinite price escalator clauses in certain intrastate contracts for the sale of deregulated gas. Congress intended that Section 108 prices may be collected

Finally, as the court found, the legislative history clearly supports producer choice in the matter of price categories (App. 19a).

The Commission suggests that since most assumed energy prices would exceed inflation rather than vice versa, Congress gave no consideration to the result that has ensued—the highest price is an incentive regulated price (Comm. Pet. at 20-21). This argument attempts to override clear statutory language with legislative history. The attempt fails; the fact that most assumed deregulated prices would be higher illuminates the legislative history and confirms the Court of Appeals' result. The legislators were simply saying that Section 101(b)(5) allows producers to obtain the highest price under any applicable category.[16]

Impact. Finally, the Commission and its supporters argue that the *Martin* opinion may increase consumer's natural gas costs in the 1985-1987 period by approximately $300 million, or about $100 million per year. It is alleged that pipelines and their customers cannot bear such costs. To the contrary, the financial impact of the *Martin* opinion is minimal. Where financial impacts occur, they result solely from Congressionally intended incentive prices and pipelines' own voluntary promises to pay those prices.

notwithstanding that limitation, as the Commission acknowledged in Order No. 406-B, 30 FERC (CCH) ¶ 61,152 at 61,323, R. 3388-9 (February 15, 1985).

[16] "It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him." 124 Cong. Rec. H13,116 (daily ed. Oct. 14, 1978) (statement of Rep. Dingell); "[T]his provision stands for the proposition that a producer may claim or apply for the highest price to which he is entitled." 124 Cong. Rec. S15,021 (daily ed. Sept. 13, 1978) (statement of Sen. Jackson).

The $100 million per year estimate was not made on the record by the Commission. Instead it is drawn from an extra-record letter from counsel for the Interstate Natural Gas Association of America to the Commission which urged the Commission to seek certiorari in this case. The estimate is the supposed result of a hasty study by highly interested parties who used unknown but clearly favorable assumptions and premises in performing the "study". Counsel for INGAA was requested to provide a copy of the "study" to Producer counsel, but did not do so. No credence should be given to such extra-record estimates. Even if we assume that producer revenues may increase by upwards of $100 million per year as a result of vacation of the Commission's rule, that amount is on the order of 0.16% of consumers' total annual gas expenditures.[17]

CONCLUSION

The Commission's effort in this case to deny producers the right to incentive price regulated category treatment is reminiscent of its effort to deny NGPA

[17] Energy Information Administration *Natural Gas Monthly*, Tables 3 and 4 (April 1987). 1986 total consumption of 14.581 Tcf times an overall average price per Mcf of $4.26 equals $62.115 billion. $100 million is about 0.16% of this annual cost.

In fact, the Commission's effort to deny producers regulated incentive prices is counterproductive. Many producers of tight formation gas desire to sell those gas supplies at prices below the regulated incentive prices in order to gain a tax credit under Internal Revenue Code § 29. *See* 26 U.S.C. §§ 29(a), (c) and (e). The tax credit is applicable only to *regulated* tight formation gas. 26 U.S.C. §29(c)(2)(B). But the Internal Revenue Service has denied tax credit treatment for this gas based on Order No. 406. Rev. Rul 86-127, 1986-2 C.B.4 (1986).

pricing treatment to pipeline production in *Mid-Louisiana*. In that case, the Court reviewed the structure of Title I of the NGPA in detail and concluded that the Commission's interpretation of the "first sale" definition of the statute was inconsistent with its plain terms. Here, the issue is considerably less difficult; the statute's meaning is clear. Where Congress has spoken on a particular matter, its will is the law and must be given effect. An agency may not "correct flaws that it perceives in the statute . . . . Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." *Federal Reserve System*, 474 U.S. 361, 106 S. Ct. 681 at 689. The Court's inquiry must therefore "come to rest with the conclusion that the action of [the agency] is inconsistent with the language of the statute." *Id.*

The narrow statutory construction issue involved is of limited applicability which decreases every day as gas depletion of wells subject to older contracts continues. No conflict among the circuits exists or is likely.

The writs should be denied.

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ADDENDUM

ADDENDUM

This addendum lists the parent companies, non-wholly-owned subsidiaries and affiliates of the corporate respondents joining in this brief and is filed pursuant to Rule 28.1 of the rules of this Court.

AMOCO PRODUCTION COMPANY

Amoco Production Company is a wholly-owned subsidiary of Amoco Corporation. To the best knowledge of counsel, affiliates of Amoco Production Company that may have securities in the hands of the public in the United States or Canada are:

Amoco Australia Limited
Amoco Canada Petroleum Company, Ltd.
Amoco Company
Amoco Credit Corporation
Amoco Oil Holdings, S.A.
Amoco (U.K.) Exploration Company
Analog Devices, Inc.
Cetus Corporation
Cyprus Mines Corporation.

ARCO OIL AND GAS COMPANY

Arco Oil and Gas Company is an affiliate of Atlantic Richfield Company. The non-wholly-owned subsidiaries of Atlantic Richfield Company are:

Alyeska Pipeline Service Company
Anamax Mining Company
ARCO Chemical Company
ARCO Solar (Europe) GmbH
ARCO Solar Nigeria Ltd.
Arcobrasil Participacoes e Investimentos

Ltda.
Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal Pty. Limited
Compania Minera Dos Republicos S.A. de C.V.
Compania Petrolera Carco
Colonial Pipeline Company
Cook Inlet Pipe Line Company
Curragh Coal Sales Co. Pty. Ltd.
Dixie Pipeline Company
East Texas Salt Water Disposal Company
85819 Canada Limited
Eisenhower Mining Company
FX Liquidation Corporation
Industrias Nacobre S.A. de C.V.
Iricon Agency Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Company
Las Quintas Serenas Water Company
Logan Aluminum, Inc.
Nordisk Mineselskab A/S
Platte Pipe Line Company
Prince Consolidated Mining Company
Rodman, Inc.
Showa Arco Solar Far East Pte Ltd.
Showa Arco Solar KK
Sinclair Venezualan Oil Company
Smoke House Copper Mining Company
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

BHP PETROLEUM COMPANY INC.

BHP Petroleum Company Inc. is owned by BHP Petroleum (Americas) Inc., which is owned by BHP

Holdings USA Inc., which is owned by BHP Petroleum Proprietary, Ltd., which is owned by Broken Hill Proprietary Company, an Australian corporation. BHP Petroleum Proprietary, Ltd. owns a partial interest in Hamilton Oil Corporation.

CHEVRON U.S.A., INC.

Chevron U.S.A., Inc. is a wholly-owned subsidiary of Chevron Corporation. The non-wholly-owned subsidiaries and affiliates of Chevron Corporation are:

AMAX Inc.
Arabian American Oil Company
Atlas Supply Company
C-W Properties Inc.
Caltex Mediterranean Limited
Caltex Petroleum Corporation
Canyon Reef Carriers, Inc.
Chevron Capital N.V.
Chevron Capital U.S.A. Inc.
Chevron Investment Management Company
Chevron Oil Finance Company
Dixie Pipeline Company
Explorer Pipeline Company
Felix Oil Company
Glenwood Properties
Gulf Oil Finance Company
Kenai Pipe Line Company
Long Beach Oil Development Company
Mid-Valley Pipeline Company
Paloma Pipe Line Company
Pembroke Capital Company Inc.
Plantation Pipe Line Company
Platte Pipe Line Company
Refineria Petrolera de Guatemala-California, Inc.

Standard Pacific Gas Line Incorporated
UNC Incorporated
West Texas Gulf Pipe Line Company

CITIES SERVICE OIL AND GAS CORPORATION

Cities Service Oil and Gas Corporation is a wholly-owned subsidiary of Cities Service Company, which is in turn, a wholly-owned subsidiary of Occidental Petroleum Corporation. Its non-wholly-owned affiliates are:

Canadian Occidental of California, Inc.
IBP, Inc.

EXXON CORPORATION

The non-wholly-owned subsidiaries and affiliates of Exxon Corporation that may have securities in the hands of the public in the United States or Canada are:

Exxon Pipeline Company
Imperial Oil Limited

GRACE PETROLEUM CORPORATION

The parent company of Grace Petroleum Corporation is W. R. Grace & Company. The non-wholly-owned subsidiaries, partnerships and joint ventures of W. R. Grace & Company are:

United States

Agracetus
AmmTrans
Axial Basin Ranch Company
AWI

Bartow Chemical Products
Bison Nitrogen Products
Carbon Dioxide Slurry Systems L.P.
CFF Beverage Company
Colowyo Coal Company
Del Taco Corporation
Four Corners Mine
Ft. Meade Chemical Products
GHL Management, Inc.
Grace Drilling Company
Grace-Feldmuehle Motor Ceramics Company
Grace Ventures Partnership One
Hayden Gulch West Coal Company
H-G Coal Company
Home Quarters Warehouse, Inc.
Marine Culture Enterprises
Monolith Enterprises, Incorporated
Mountainview Insurance Company
National Medical Care, Inc.
Oklahoma Nitrogen Co.
Paramont Coal Company
Pursue Gas Processing and Petrochemical Company
Sierra Chemicals Company
Taco Villa, Inc.
T & D Beverage, Inc.
TAG Pharmaceuticals, Inc.

Canada

First New York Corp.

Colombia

Productora de Papeles S.A.

Germany

Feldmuehle—Grace Noxeram G.m.b.H.

Japan

Fuji-Davison Chemical Ltd.
Kabushiki Kaisha Furukawa Seisakusho
Nippon Belt Kogyo Kabushiki Kaisha
Teroson Kabushiki Kaisha

Trinidad and Tobago

Homco Trinidad Ltd.
Trinidad Nitrogen Co., Limited

United Kingdom

Dunbee-Elm Ltd.
Sea Oil Homco Limited

MARTIN EXPLORATION MANAGEMENT COMPANY
COLORADO ENERGY CORPORATION

The non-wholly-owned subsidiaries and affiliates of Martin Exploration Management Company are:

Martin Oil Marketing, Ltd.
Martin Oil of Indiana, Inc.
Pioneer Steel and Tube Disributors, Inc.
Russell Well Servicing, Inc.
Financial Associates, Inc.

Colorado Energy Corporation has no non-wholly-owned subsidiaries or affiliates other than those listed above.

PENNZOIL COMPANY

The non-wholly-owned subsidiaries and affiliates of Pennzoil Company are:

National Transit Company
10 Minute Service Centres Limited
The Eureka Pipe Line Company
American Sulphur Export Corporation
Pennzoil (U.K.) Limited
P. T. Sungai Kencana
P. T. Indo Muro Kencana
Proven Properties Inc.

PHILLIPS PETROLEUM COMPANY

The non-wholly-owned subsidiaries and affiliates of Phillips Petroleum Company are:

Alyeska Pipeline Service Company
Arctic LNG Transportation Company
Bissendorf Biosciences GmbH
Canada Western Cordage Company, Limited
Canyon Reef Carriers, Inc.
Chisholm Pipeline Company
Cochin Refineries Limited
Colonial Pipeline Company
Dixie Pipeline Company
East Texas Salt Water Disposal Company
Explorer Pipeline Company
Great Yarmouth Port Labour Company Limited
Heat Transfer Research, Inc.
Insurance & Reinsurance Brokers (Bermuda) Limited
Iranian Marine International Oil Company-Iminoco

Kenai LNG Corporation
Long Beach Oil Development Company
Multinational Gas and Petrochemical Com pany
Multinational Gas and Petrochemical Services Limited
Norland GmbH Fur Grundbesitz Und Indus trieanlagen
Norpipe A.S.
Norpipe Petroleum UK Limited
Norsea Gas A/S
Norsea Gas GmbH
Norsea Pipeline Limited
Oil Insurance Limited (New)
Papago Chemicals, Inc.
Phillips Carbon Black Limited
Phillips Petroleos Chile S.A.
Phillips Petroleum Singapore Chemicals (Private) Limited
Phillips Petroleum Toray Inc.
Phillips-Imperial Petroleum Limited
Polar LNG Shipping Corporation
Proteina Brasileira Ltda.
Renoilt - Haus GmbH
Solar Gas, Inc.
Spodco Limited
Spodco-USA, Inc.
The Salk Institute Biotechnology/Industrial Associates Inc.
Venezoil, C.A.
Western Desert Operating Petroleum Company (WEPCO)
White River Shale Oil Corporation

PLACID OIL COMPANY

Placid Oil Company is a privately owned corporation. It has no subsidiaries or affiliates which are not wholly owned.

SHELL OFFSHORE, INC.
SHELL WESTERN E & P, INC.

Shell Oil Company wholly owns all of the stock of Shell Energy Resources, INc., which Company wholly owns all of the stock of Pecten International Company, Scallop Coal Corporation, Shell Offshore INc., Shell Minng Company and Shell WEstern E&P Inc. Al of Shell Oil Company's common stock is owned by SPNV Holdings, Inc., a Delaware corporation, whose stock is owned by Shell Petroleum N.V., a Netherlands company. The voting shares of Shell Petroleum N.V. are held sixty percent (60%) by Royal Dutch Petroleum Company and forty percent (40%) by Shell Transport and Trading Company, a Public Limited Company in London, U. K. Shell Oil Company also wholly owns directly or indirectly a number of companies. The following companies are affiliates of the companies named above, but are not wholly-owned subsidiaries:

Fractionation Research, Inc.
Gravcap, Inc.
Heat Transfer Research, Inc.
Inland Corporation
Loop, Inc.
MESBIC Financial Corporation f Houston
Oil Companies Institute for Marine Pollution Compensation Limited
Oil Insurance Limited
Seadock, Inc.

Pecten Cameroon Company
Thums Long Beach Company
East Texas Salt Water Disposal Company
Grande Ecallie Land Company, Inc.
Van Salt Water Disposal Company
Wyoming Industrial Development Corporation
Lucky Chance Mining Company, INc.
George Neuman and Company
United Scientific, Inc.

UNION OIL COMPANY OF CALIFORNIA

The non-wholly-owned affiliate of Union Oil Company of California is Union Exploration Partners, Ltd.

UNION PACIFIC RESOURCES COMPANY

The parent of Union Pacific Resources Company is Union Pacific Corporation. The non-wholly-owned subsidiaries and affiliates of Union Pacific Corporation are:

Bear Creek Uranium Company
Black Butte Coal Company
Camas Prairie Railroad Company
Carbon County Coal Company
Corpus Christi Petrochemical Company
The Denver Union Terminal Railway Company
Esperanza Pipeline Company
Ferguson-Burleson County Gas Gathering System
Frontier Pipeline
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company

Longview Switcghing Company
M-C Carbon Partnership
Medicine Bow Coal Company
The Ogden Union Railway and Depot Company
Portland Traction Company
Portland Terminal Railroad Company
The St. Joseph and Grand Island Railway Company
St. Joseph Terminal Railroad Company
Southern Illinois and Missouri Bridge Company
Stansbury Coal Company
Stauffer Chemical Company of Wyoming
Trailer Train Company
Uinta Development Company
Union Pacific Corporation
Union Pacific Resources Ltd.
Upland Industries Corporation
The Weatherford Mineral Wells and Northwestern Railroad Company
Arkansas & Memphis Railway Bridge and Terminal Company
Automated Monitoring and Control International, Inc.
Central California Traction Company
Chicago and Western Indiana Railroad Company
Great Southwest Railroad, Inc.
Oakland Terminal Railway
Railroad Association Insurance Limited
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
The Belt Railway Company of Chicago

The Pueblo Union Depot and Railroad Company
Union Pacific Realty Company

(5)

No. 87-363

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

DONALD B. AYER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
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Federal Energy Regulatory Commission
Washington, D.C. 20426

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In the Supreme Court of the United States

OCTOBER TERM, 1987

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TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

The court of appeals held that Section 101(b)(5) of the Natural Gas Policy Act of 1978 (NGPA or Act), 15 U.S.C. 3311(b)(5), permits a natural gas producer whose gas is qualified in more than one NGPA category to compare the prices its contracts allow it to charge at a given time for gas in each category and select the highest price. In our petition for a writ of certiorari, we contended that Section 101(b)(5) places such gas in whichever of the categories imposes the highest legal ceiling, without regard to the terms of individual producer contracts. We argued that the court of appeals' decision is contrary to the language of Section 101(b)(5), is inconsistent with the NGPA's overall approach to regulation (setting ceiling prices only, without regard to producers' contract prices), and would significantly undercut the fundamental NGPA policy of phased deregulation. We also argued that, unless the decision below is reversed, respondents would reap a tremendous windfall, ultimately at the expense of gas consumers. The points raised by respondents in no way answer our claims and warrant only brief comment.

We agree with respondents, as we stated in our petition (at 13), that Section 101(b)(5) determines the proper treatment of dual-qualified regulated-deregulated gas (Br. in Opp. 8-9) and that Section 121, 15 U.S.C. 3331, does not override Section 101(b)(5) (Br. in Opp. 13-15). We also agree (see Pet. 14) that Section 101(b)(5) does not refer "to the realm of theoretical possibilities" (Br. in Opp. 10). Respondents are wrong, however, when they assert that Section 101(b)(5) allows producers to make a choice among several applicable NGPA provisions based on individual contract prices.

Section 101(b)(5) states that, when several NGPA provisions apply, "the provision which could result in the highest price shall be applicable." The statute thus calls for a comparison of NGPA provisions, not contracts; what is to be compared are the highest prices legally permitted by each provision applicable to a given quantity of gas, not the particular prices producers have included in their contracts. Respondents support their contrary reading by rewriting the statute. They assert that the statute makes applicable the provision that "results" (Br. in Opp. 14), "actually results" (*id.* at 11), or "will result" (*id.* at 8, 16) in the highest price. But the statute requires application of the provision that "could result" in the highest price. When one of several applicable provisions declares that there are no upper limits on producer prices, that deregulating provision is the one that could result in the highest price.

Contrary to respondents' claim (Br. in Opp. 10, 12), this natural reading of Section 101(b)(5) does not at all render the provision "meaningless." The categories of natural gas defined by the NGPA are overlapping, and a rule is therefore required to determine where to place gas that is qualified in more than one category. Section 101(b)(5) furnishes the needed rule. It does so in a single sentence, referring to all cases of dual-qualified gas—including both regulated-deregulated gas and gas that is qualified for two regulated categories. Although the result of the required comparison is always the deregulating provision in the former case, Section 101(b)(5) requires comparison of two ceiling prices in the latter case (regulated-regulated gas). Of course, our construction of Section 101(b)(5) is identical to respondents' in the regulated-regulated case, so our reading no more makes the statute meaningless than does respondents'.[1]

As we pointed out in our petition (at 15-16), a reading of Section 101(b)(5) that requires a comparison of contract prices rather than legal limits on permissible prices would be wholly at odds with Title I of the NGPA as a whole (15 U.S.C. 3311 *et seq.*), which regulates only maximum prices producers may charge and does not concern itself with contract prices (as long as they do not exceed applicable legal ceilings). While denying that their reading of Section 101(b)(5) would result in a " 'glaring anomaly' " (Br. in Opp. 12-13), respondents do not point to a single instance in which NGPA Title I determines the price a producer must charge rather than a legal maximum. Respondents seek to divert attention from this failure by asserting (*id.* at 12-13, 16) that their reading of Section 101(b)(5) would not, as a practical matter, "entangle *the Commission* in contract construction" (Br. in Opp. 12 (emphasis added)). That assertion, however, in no way denies that respondents' (and the court of appeals') view would erroneously read the *statute* as requiring contract construction.

[1] We do not understand how the passage from *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 334-335 (1983), that respondents quote (Br. in Opp. 10-11) supports their argument. *Mid-Louisiana* concerned the meaning of "first sale" under the NGPA, and the quoted passage merely describes the potential application of Section 101(b)(5) to certain dual-qualified gas.

Respondents have also failed to explain how their view comports with the overall statutory scheme of "phased deregulation" (124 Cong. Rec. 38361 (1978)). Respondents offer no evidence that Congress contemplated the bizarre operation of the NGPA that their view entails, under which gas producers could repeatedly transfer gas back and forth between deregulated and regulated status, depending on what category provides the most money at any particular moment.[2] The NGPA is not a permanent producer assistance statute. Rather, to the extent Congress deregulated "particular aspects of the first sale of gas, it did so because [after the specified phase-in periods] it wanted to leave determination of supply and first-sale price to the market" (*Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.* ,474 U.S. 409, 422 (1986)).[3]

[2] Respondents (Br. in Opp. 14) suggest that, in the current and foreseeable energy markets, producers will not be making frequent switches. But that hardly bears on whether the NGPA permits such switchbacks. Moreover, if respondents are correct, it is only because the prices set in contracts tied to the ceilings prescribed by Sections 107(c)(5) and 108, 15 U.S.C. 3317(c)(5), 3318, are so very much higher than current deregulated market prices. That large difference, of course, means that, contrary to respondents' assertion (Br. in Opp. 17-18), the court of appeals' decision, in allowing producers to charge the higher prices, has far from a minimal impact.

[3] Respondents note (Br. in Opp. 11-12) that, as we explained in our petition (at 3-4, 16), the NGPA was the product of a careful congressional compromise. They also quote several statements from the congressional floor debates (Br. in Opp. 17 n.16). Neither the compromise nature of the NGPA nor the quoted passages nor anything else in respondents' brief, however, even remotely suggests that Congress intended the operation of the NGPA respondents propose. Moreover, respondents have advanced no evidence that Congress specifically considered the possibility that the NGPA ceiling prices would exceed deregulated market prices or specifically addressed the relation between the deregulation objectives and the production-incentive objectives of the Act where they conflict.

In addition, respondents are wrong in their discussion (Br. in Opp. 16 n.15) of the Conference Committee statement that we discussed at page 21, note 24, of our petition. Without further elaboration, we simply note that the statement is in fact addressed to the overlap of two regulated categories – Section 108 gas, and certain Section 105 gas that is made subject to a legal maximum price (*i.e.*, that is regulated) as a result of Section 121(e) (see 15 U.S.C. 3318, 3315, 3331(e)).

Finally, respondents suggest (Br. in Opp. 14, 17-18), without providing any estimate of their own, that this case has only a slight financial impact. That suggestion is both unsupported and incorrect. Contrary to respondents' assertion (*id.* at 14), the problem of dual-qualified regulated-deregulated gas will not simply disappear: as we pointed out in our petition (at 18), any deregulated new gas may also become regulated Section 108 gas as the well producing it begins to dry up. And the $300 million estimate of financial impact that we set forth in our petition (at 22) was conservative. The estimate was based on a Commission staff assessment that the potential consumer impact ranged from $300 million to $2 billion, depending on the size of the difference between the regulated and deregulated prices. In particular, the staff estimated that if the regulated price for Section 107(c)(5) tight formation gas exceeded a deregulated price by $1.00 per MMBtu, then the impact of the court of appeals' decision on consumers of such gas would exceed $1.1 billion for 1985 and 1986 alone. The regulated price-deregulated price differential for Section 107(c)(5) gas is today roughly $4.00 per MMBtu, so the impact is likely greater than originally estimated.[4]

[4] Contrary to respondents' assertion (Br. in Opp. 15 n.14), certain natural gas producers have previously asserted that dual-qualified regulated-deregulated gas should always be treated as deregulated. In comments filed in 1979 in the rulemaking proceeding that led to the Commission's adoption of Section 107(c)(5) pricing for tight formation gas (a copy of which has been lodged with the clerk), respondent Phillips Petroleum Company, among other producers, stated that Sec-

For the foregoing reasons, and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

DONALD B. AYER
*Acting Solicitor General**

CATHERINE C. COOK
General Counsel
Federal Energy Regulatory Commission

NOVEMBER 1987

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tion 121 – the NGPA deregulation provision – required deregulation for all gas in the listed categories, regardless of whether the gas also fell within a regulated category and regardless of whether the regulated or deregulated price was higher. See Comments B-11 to B-12. The same comments, we note, also adopted our position on the second question we present in our petition (*ibid.*).

* The Solicitor General is disqualified in this case.

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No. 87-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

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September 21, 1987

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INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

1987 ACTIVE MEMBERSHIP

AlaTenn Resources, Inc.
Arkla, Inc.
The Coastal Corporation
Columbia Gas Transmission Corp.
Consolidated Natural Gas Company
El Paso Natural Gas Company
Enron Corp.
Granite State Gas Transmission, Inc.
Great Lakes Gas Transmission Company
Kentucky West Virginia Gas
KN Energy, Inc.
Michigan Gas Storage Company
MidCon Corp.
Mountain Fuel Resources, Inc.
Pacific Gas Transmission Company
Pacific Interstate Company
Panhandle Eastern Corporation
SONAT, Inc.
Tenneco Gas Pipeline Group
Texas Eastern Corporation
Texas Gas Transmission Corporation
Texas Oil & Gas Corporation
Transco Gas Company
United Gas Pipe Line Company
Valero Interstate Transmission Co.
Valley Gas Transmission, Inc.
The Williams Companies

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

1987 ASSOCIATE MEMBERS

Amoco Production Company
ARCO Oil and Gas Company
Atlanta Gas Light Company
The Brooklyn Union Gas Company
Chevron USA
Cities Service Oil and Gas Corporation
Conoco Inc.
Entex, Incorporated
Exxon Company, U.S.A.
John H. Hill
HNG Oil Company
Kerr-McGee Corporation
Kinsey Interests, Inc.
Laclede Gas Company
Lear Petroleum Exploration Company
Marathon Oil Company
Mewbourne Oil Company
National Fuel Gas Company
NUI Corporation
Oklahoma Natural Gas Company,
a Division of ONEOK Inc.
Phillips Petroleum Company
Shell Oil Company
Southern California Gas Company
Sun Exploration & Production Company
Texaco U.S.A.
Union Pacific Resources Company
Unocal Corporation

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-363

FEDERAL ENERGY REGULATORY COMMISSION,
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v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit

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MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR *CERTIORARI*

The Interstate Natural Gas Association of America ("INGAA")[1] hereby moves for leave to file the accompanying brief *amicus curiae* in the captioned matter. This motion is being filed in compliance with the Court's Rule 36. As of the date this motion is being sent to be printed, counsel for six parties out of the 38 party-respondents listed in the petition for *certiorari* herein have declined to consent

[1] INGAA'S member companies are listed, *supra*.

to INGAA's filing of a brief *amicus curiae*. All of the objecting parties are gas producers. No other objections have been received although all respondents were contacted in writing.[2]

INTEREST OF THE *AMICUS CURIAE*

INGAA is a nonprofit national association representing virtually all of the major interstate natural gas transmission companies operating in the United States. INGAA's members account for over 90% of all natural gas transported and sold for resale in interstate commerce, and they are subject to the jurisdiction of the Commission under various provisions of the Natural Gas Act ("NGA"), 15 U.S.C. §§717, *et seq.*; the Department of Energy Organization Act, 42 U.S.C. §§7101, *et seq.*; and the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§3301, *et seq.*

INGAA is filing this brief in support of the request of the Petitioner, the Federal Energy Regulatory Commission ("Commission"), for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") in *Martin Exploration Management Company, et al.* v. *Federal Energy Regulatory Commission*, 813 F.2d 1059 (Nos. 84-2756, *et al.*, 10th Cir., decided March 9, 1987, as modified on May 1, 1987). App. 1a.[3]

This case involves Commission rules relating to gas which is qualified in both a regulated and a price-deregulated category under the NGPA.[4] The Commission held that the express deregulation provisions in NGPA Section

[2] Copies of such responses as have been received have been lodged with the Clerk of this Court.

[3] App. refers to the Appendices to the Commission's Petition for a Writ of Certiorari filed herein on August 31, 1987.

[4] 15 U.S.C. §§3301, et seq.

121 require that such dual-category gas be treated as deregulated.

On review, the Tenth Circuit conceded the reasonableness of the Commission's interpretation of Section 121 as such, but it held that NGPA Section 101(b)(5) *requires* a result contrary to that adopted by the Commission. According to the Tenth Circuit, Section 101(b)(5) *mandates* that dually-qualified (regulated/deregulated) gas shall forever be in a state of price instability, with the price alternately flip-flopping between a regulated and a deregulated status, depending on which category will, under the applicable contract provisions and market conditions prevailing at any given moment, produce the highest actual price.

The decision of the Tenth Circuit results in substantial prejudice to interstate pipelines. An INGAA survey, based on responses by 20 pipelines representing 78 percent of the interstate market, shows that the application of the Tenth Circuit's decision during the period 1985-87 could have increased total gas costs by $300 million (roughly $100 million during each of the three years) and would have increased the pipelines' aggregate take-or-pay exposure by $187 million. The $100 million in higher annual gas costs will in future periods be passed on to ultimate consumers by virtue of NGPA Section 601(c)(2), providing for guaranteed passthrough of NGPA determined prices.

Unless reversed by this Court, the decision of the Tenth Circuit will deprive pipelines of substantial revenues that, ultimately, gas consumers will be required to pay to independent producers of gas. The Commission's interest in this matter, while substantial, is nevertheless statutory, and its interest in the outcome is that of a regulator which is not subject to competitive impacts flowing from the Tenth Circuit's decision. On the other hand, INGAA's pipeline members have a direct economic interest. The Tenth Circuit's decision adversely affects the ability of INGAA'S

pipeline members to compete, and it exacerbates the very serious and well-known marketing problems which INGAA's pipeline members are confronting. The participation of INGAA as *amicus curiae* will thus provide this Court with the views of the gas industry's pipeline segment. Accordingly, INGAA's participation will broaden the Court's perspective as to the importance of this case to the national interest.

The parties opposing INGAA's request for consent to file its brief amicus curiae are independent producers of natural gas. Naturally, those producers desire to preserve their "victory" and cut off the opportunity for adverse parties to present opposing insights. However, this is not a private lawsuit nor an occasion for spoils to be preserved for a victor. The Court's rule requiring consent of other parties should not be available for the objecting producers' parochial interests in cases of great *public* significance such as the case at bar.

Furthermore, prior decisions of this Court, such as the *Mid-Louisiana*[5] and *Transco*[6] cases, amply attest to the complexity of the NGPA and the difficulties in determining the intent of Congress in enacting it. For this reason as well, this Court should not foreclose participation by the major industry segment of interstate pipelines represented by INGAA.

Finally, no party can reasonably claim prejudice as a result of INGAA's participation here. The Commission's orders, which were reversed by the Tenth Circuit, were generic rulemaking orders issued in the light of comments filed by representatives of the entire gas industry—producers, pipelines, and distributors. Thus, there is no op-

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[5] *Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983).

[6] *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, ___ U.S. ___, 106 S. Ct. 709 (1986).

portunity for INGAA's arguments to prejudice those private interests who would cut off public debate.

WHEREFORE, for the reasons stated above, INGAA respectfully prays that this motion be granted and that this Court receive the attached brief *amicus curiae* for filing.

Respectfully submitted,

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Counsel of Record
EDWARD B. MYERS

Attorneys for Interstate Natural Gas Association of America

September 21, 1987

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

The Interstate Natural Gas Association of America ("INGAA"), in accordance with this Court's Rule 36, has received the written consent of several of the parties to file this brief as *amicus curiae*, and copies have been filed with the Clerk.[1]

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[1] The industry-wide importance of this case is indicated by the fact that, as shown by petition for *certiorari* filed herein by the Federal Energy Regulatory Commission, there are some 38

INGAA is filing this brief in support of the Petitioner, the Federal Energy Regulatory Commission ("Commission"). For reasons appearing below, INGAA prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") in *Martin Exploration Management Company, et al.* v. *Federal Energy Regulatory Commission*, 813 F.2d 1059 (Nos. 84-2756, *et al.*, 10th Cir., decided March 9, 1987, as modified on May 1, 1987). App. 1a.[2]

INTEREST OF THE *AMICUS CURIAE*

INGAA is a nonprofit national association whose members represent virtually all of the major interstate natural gas transmission companies operating in the United States. INGAA's members account for over 90% of all natural gas transported and sold for resale in interstate commerce, and they are subject to the jurisdiction of the Commission under various provisions of the Natural Gas Act ("NGA"), 15 U.S.C. §§717, *et seq.*; the Department of Energy Organization Act, 42 U.S.C. §§7101, *et seq.*; and the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§3301, *et seq.* The decision of the Tenth Circuit results in substantial prejudice to interstate pipelines and ultimate consumers of natural gas.[3]

party-respondents, one of which is INGAA (representing many interstate pipelines). Certain gas producers, who also are respondents herein, have opposed INGAA's request to file this brief *amicus* (see INGAA's motion for leave to file this brief *amicus*, attached, *supra*).

[2] App. refers to the Appendices to the Commission's Petition for a Writ of Certiorari filed herein on August 31, 1987.

[3] An INGAA survey, based on responses by 20 pipelines representing 78 percent of the interstate market, shows that the application of the Tenth Circuit's decision during the period 1985-87 could have increased total gas costs by $300 million (roughly $100 million during each of the three years) and would have increased the pipelines' aggregate take-or-pay exposure by $187 million. The $100 million in higher annual gas costs will be passed on to ultimate consumers by virtue of NGPA Section 601(c)(2), providing for guaranteed pass through of NGPA determined prices.

ARGUMENTS IN SUPPORT OF PETITION

This case involves Commission rules relating to gas which is qualified in more than one NGPA category, where one of those categories is deregulated under NGPA Section 121. The Commission, applying Section 121 of the NGPA, held that the deregulation provisions in that section mandate that such dual-category gas must be treated as deregulated under the statute.[4] The Commission's orders thus implement NGPA Section 121 which states that "the provisions of subtitle A respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall . . . cease to apply effective January 1, 1985."

On review, the Tenth Circuit conceded the reasonableness of the Commission's interpretation of Section 121 as such, but it held that Section 101(b)(5) *requires* a result contrary to that adopted by the Commission. Specifically, the Tenth Circuit held:

> We conclude that §121 is ambiguous. Therefore, in the absence of another provision in the statute, FERC's determination that dual category gas is to be considered

[4] "Deregulation appears to be mandatory. Producers cannot opt out of the statutory scheme on January 1, 1985, merely because market conditions are unfavorable." App. 76a.

deregulated would be a reasonable interpretation of the ambiguous language of §121. But Congress has anticipated precisely this question in §101(b)(5). [813 F.2d 1066.]

The Tenth Circuit thus substituted its own interpretation of the statute for that of the Commission. According to the Tenth Circuit, Section 101(b)(5) *mandates* that dually qualified (regulated/deregulated) gas shall forever be in a state of price instability, with the price alternately flip-flopping between a regulated and a deregulated status, depending on which category will, under the applicable contract provisions and market conditions prevailing at any given moment, produce the highest actual price.

Oddly, the Tenth Circuit imposed its own views even though it *twice* conceded that its interpretation produces anomalous results which were unanticipated and unintended by Congress. 813 F.2d at 1068 n. 11, and 1071. The interpretation of the Tenth Circuit is particularly suspect not only because it rests on a tenaciously-held interpretation of a *single word* in Section 101(b)(5), *i.e.*, the word "could", but also because it perverts a statutory scheme for *deregulation* into a closely regulated *price support* program.[5]

I. The Tenth Circuit's Decision Is Inconsistent with the Plain Meaning of the Statute.

The Commission reasonably and correctly refused to read Section 101(b),(5) in a manner which would extend *regulation* of producer prices when those prices

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[5] In addition, the Tenth Circuit disagreed with the Commission's conclusion that gas which is determined to qualify as new tight formation gas (Section 107(c)(5)) is also implicitly deemed to qualify as either Section 102(c) or 103 gas.

would otherwise be *deregulated* consistent with Congress' overall deregulation objective reflected in NGPA Section 121.[6] It concluded that the statutory language in Section 101(b)(5)—stating that the NGPA category which "could" result in the highest price shall be applicable—is a reference to the deregulated price where dually-qualified (regulated/deregulated) gas is in question.[7] It did so in light of the mandate of Section 121 of the NGPA to move toward deregulation and because there always exists at least the potential for the parties to negotiate a (deregulated) contract price above the old regulated ceiling price. App. 79a.[8]

Contrary to the claim of the Tenth Circuit, Section 101(b)(5) does not reflect an unambiguous congressional intent which requires the rejection of the inter-

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[6] As this Court explained previously in its *Mid-La II* opinion:

> For some categories of gas, the NGPA ceiling prices are an intermediate step on the path from a fully regulated industry to a deregulated industry. Sections 121 and 122 of the NGPA provide a mechanism for the ultimate decontrol of a number of categories of natural gas.

Public Service Commission of the State of New York v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 336 n. 14 (1983).

[7] The Commission had explained, preliminarily, that a producer would have to qualify its gas—even if it were deregulated—before it could engage in a "first-sale" of that gas. App. 65a-66a.

[8] Thus, the Commission's action is consistent with established rules of statutory interpretation holding that the "intention prevails over the letter, and the letter must if possible be read so as to conform to the spirit of the Act." 2A *Sutherland Statutory Construction*, §46.07, at 65 (4th ed. 1973).

pretation adopted by the Commission.[9] The crux of the Tenth Circuit's error lies in its declaration, which is unsupported and patently not supportable, that the Commission's interpretation of the word "* * * 'could'—one that considers only the theoretical possibilities—renders §101(b)(5) meaningless." 813 F.2d at 1068. The Tenth Circuit's error was its failure to follow well-established principles of statutory construction in its analysis of the provision at issue here. Unless otherwise indicated, words should be given "their ordinary, contemporary, and common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)(citations omitted). The ordinary meaning of the word "could" connotes a level of uncertainty or possibility.[10] The Commission, consistent with that connotation, held that, as a matter of simple logic, deregulated gas, which is subject to no price ceiling, *could* always be priced higher than gas which remains subject to a price cap, regardless of how high a level to which that cap may rise under the provisions of the NGPA.[11] That is, the Commission read the term "could" as referring, not to actual prices, as the Tenth Circuit held, but only to the legally permissible prices.

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[9] "* * * We reverse and remand because FERC's interpretation is contrary to the clear intent of Congress as expressed in the unambiguous language of the NGPA." 813 F.2d at 1065.

[10] For example, *Webster's Third New International Dictionary*, unabridged version, defines the word as "used in auxiliary function in the past tense . . . , in the past conditional . . . , and as an alternative to can suggesting less force or certainty . . . ."

[11] Quoted *supra*. Indeed, as noted earlier, that was a general pattern in the pre-NGPA era when price escalation provisions in producer contracts would have permitted wellhead prices exceeding NGA just and reasonable levels.

The Commission concluded that gas which is not limited by a price ceiling always has the potential to be higher than a regulated price.

Clearly, the Commission's reading of the word "could" is not meaningless and does not render Section 101(b)(5) meaningless. It is an interpretation which is consistent with the statutory intent. It is the very sort of interpretation to which the courts are bound to give deference.[12] Indeed, the deference to be accorded to an agency's interpretation is strongest where the agency is carrying out its congressionally-imposed mandate:

> * * * We have elsewhere held that we may not, 'in the absence of compelling evidence that such was Congress' intent . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.' Permian Basin Area Rate Cases, 390 U.S. 747, 780.[13]

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[12] For example, in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 483 (1984) ("*Chevron*"), this Court explained that a court is not free to adopt its own interpretation in place of the one chosen by the agency. Rather, if the agency's

> ' * * * choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' *United States* v. *Shimmer*, 367 U.S. 374, 383 * * * (1961).

[13] *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968) (additional citations omitted).

The Commission's action here is in furtherance of its duty to carry out Congress' statutory scheme of deregulation and there is no "compelling evidence" that Congress intended Section 101(b)(5) to be read in a manner that would thwart that goal.

In contrast to the Commission's rational and reasoned interpretation, the Tenth Circuit's artificial interpretation, which requires an actual price comparison at a particular moment in time, does violence to the language of the statute. The Tenth Circuit's view requires reading Section 101(b)(5) as if the word "could" were replaced by "would" or "will." Such a reading is plainly unreasonable.[14] Thus, on the basis of an analysis of the statutory language itself, the Tenth Circuit's interpretation must fail.

II. The Tenth Circuit's Interpretation Is Inconsistent with the Purpose and History of the NGPA.

The reasonableness of the Commission's interpretation is also clear against the backdrop of the NGPA. Although pricing provisions in producer contracts generally provided for escalations in prices, the Commission (Federal Power Commission) had been constrained under the NGA's "just and reasonable" standard to limit such prices to cost-based levels, even though those price levels tended to be below the prices dictated by the market.[15] The Commission's inability

[14] As this Court has said, "[n]ormal principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ . . . ." *Offshore Logistics, Inc.* v. *Tellentire*, 477 U.S. ___, ___, 91 L.Ed.2d 174, 189 (1986).

[15] *See, Atlantic Refining Co.* v. *Public Service Commission of New York*, 360 U.S. 378, 391-93 (1959).

to provide adequate wellhead price incentives above the cost-based just and reasonable standard of the NGA frustrated producer efforts to explore for and develop incremental gas supplies for interstate pipelines. Gas supplies were therefore naturally attracted to the unregulated intrastate markets and a severe gas shortage in the interstate market ensued during the 1970's.[16] Congress, through the NGPA, replaced the NGA's cost-based "just and reasonable" standard for gas producers "with a precise schedule of [higher] price ceilings."[17] However, pending implementation of the NGPA's phased deregulation scheme, "first-sale" prices were permitted to rise only to the level of those price *ceilings* if contracts would permit.

Thus the NGPA price ceilings were not intended to increase the price for "first-sales" above market determined levels specified in producer contracts, *i.e.*, the NGPA price ceilings were not intended to be price *floors*. Rather, the ceilings were prescribed as upper limits upon the prices that would result from the unfettered operation of supply-demand forces.[18] The Commission's reading gives full sway to this acknowledged congressional intent.

In defending its position, the Tenth Circuit insists that the Commission:

> * * * has confused the ultimate purpose of the statute—'to assure adequate supplies of

[16] See *Mid-La II, supra*, 463 U.S. at 330-31 ("The interstate rates remained substantially below the unregulated prices available for intrastate sales, and the interstate supply remained inadequate.").

[17] *Id.* at 334.

[18] *Id.* at 336, fn. 14, quoted *supra*.

natural gas at fair prices,' *Transcontinental Gas Pipe Line Corp.*, 106 S.Ct. at 716—with one of several means chosen to accomplish that purpose—phased deregulation. * * * Incentive prices for difficult to produce gas are another means by which Congress sought to increase energy supplies. * * * We will not strain the plain meaning of §101(b)(5) in order to serve a goal of deregulation that is itself only one of several means adopted to achieve the purposes of the NGPA. [813 F.2d at 1070-71 (footnote omitted)].

A basic error in the Tenth Circuit's reasoning is its failure to appreciate the nature of the "incentive" under the NGPA. While it is true that this Court and other courts have referred to the fact that the NGPA is designed to create incentives for the production of natural gas, it is clear that those incentives do not take the form of higher prices *imposed* on the market. On the contrary, the incentives were found in *ceiling* prices applicable when contracts permitted, and the incentives for new gas were significantly higher than levels permissible under the NGA's cost-based just and reasonable standard.

Thus, the new NGPA ceilings clearly contemplated that *if the market forces would support such a high price* the seller would be allowed to charge a price up to the ceiling level if the sales contract permitted. This fact is made very clear in Section 101(b)(9) which provides that, regardless of whether gas is regulated or deregulated, the price charged cannot exceed the contract price, even if that price is well below the allowable ceiling price.

This Court noted in *Mid-La II*, 463 U.S. at 339, that "the Conference Committee admonishes that 'maximum lawful prices are ceiling prices only. In no case may a seller receive a higher price than his contract permits.' HR Conf. Rep. No. 75-1752, p. 74 (1978)." A similar point of view was expressed by Congressman Dingell who said that:

> The rule set forth in section 101(b)(9) is that the legislation establishes *ceiling* prices. Contract prices may be lower than the federal maximum lawful price. In such cases the contractual arrangement between the parties continues to govern their relationship and is not superseded by the federal ceiling price.[19]

The Tenth Circuit's interpretation, however, does not allow the NGPA prices to operate as ceilings.

Furthermore, the Tenth Circuit is wrong when it implies that incentive prices and deregulation are two different means used to achieve the goal of the statute. The two divergent forces to which the Tenth Circuit makes reference, *id.* at 1070, citing *Mid-La II*, were those favoring a relatively brief transition to deregulation and those favoring simply an increase in the allowable, regulated ceiling price.[20] The com-

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[19] *Natural Gas Policy Act Information Service*, ¶101:230, p. 2 (emphasis in original).

[20] "The House bill proposed a 'single uniform price policy for natural gas produced in the United States.' HR Rep No. 95-496, pt 4, p 96 (1977). * * * The Senate bill . . . would have maintained Natural Gas Act regulation for all gas sold or delivered in interstate commerce before January 1, 1977, and steadily cut back on Commission jurisdiction so that all natural gas sold after January 1, 1982, would have been completely deregulated." *Mid-La II*, 463 U.S. at 331.

promise was the NGPA which, pending eventual deregulation, subjects virtually all new gas to market force pricing.

It is simply absurd for the Tenth Circuit to suggest that to achieve its goal of assuring adequate gas supplies at *fair* prices,[21] Congress intended to force the price of gas above the levels dictated by the market forces of supply and demand.[22] Indeed, the Tenth Circuit candidly admits that its interpretation produces an

> * * * anomalous situation [where] . . . producers seek the regulated ceiling price rather than the deregulated market price. * * * Therefore, §101(b),(5) can have the unanticipated effect of operating as a price floor for producers. [813 F.2d at 1071].

It is wholly indefensible for the Tenth Circuit to claim that its decision is consistent with the goals of the NGPA when, in fact, it upsets the very core of that statute.

As this Court recently noted, the NGPA reflects "Congress' determination that the supply, the demand, and the price of high-cost gas be determined by market forces" and that "[t]o the extent Congress

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[21] *Transcontinental Gas Pipe Line Corp.* v. *State Oil and Gas Board of Mississippi*, ___ U.S. ___, ___, 106 S. Ct. 709, 716 (1986), cited at 813 F.2d 1070.

[22] *See* NGPA Section 123 which requires the Department of Energy to submit two reports to Congress, each evaluating "whether equilibrium exists between supply and demand for natural gas." Equilibrium cannot be achieved unless the market forces are allowed to operate unfettered by artificial price supports.

denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because it wanted to leave determination of supply and first-sale price to the market." Thus, this Court concluded that the statute was "a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas . . . ." *Transcontinental, supra*, 106 S. Ct. 709, 716-17 (1986).

The Commission has sought to give full reign to market forces in its interpretation of the statute. In contrast, the Tenth Circuit would turn the NGPA into a price *support* scheme which would protect producers from downside risks and force gas consumers to pay above-market prices for their gas. Nothing in the language or legislative history of the NGPA supports such a result.

In addition, the Tenth Circuit's view, when carried to its logical conclusion, would require the Commission, as the agency charged with enforcing the provisions of the NGPA, to examine each contract to determine what price would apply if the gas in question is dually-qualified. And, if the contract should require the parties to renegotiate the contract price, the Commission, in order to determine which of the two prices is higher, would have to wait until after the parties attempt to renegotiate the contract price before it could determine whether the gas should be treated as regulated or deregulated. Such an undertaking would have to be made on a monthly or even more frequent basis as ceiling prices and market conditions changed.

Congress did not intend to require the Commission to become bogged down in matters of contract inter-

pretation. This is evident in light of the NGPA's legislative history. As Congressman Dingell stated:

> The FERC is intended to play an enforcement role with respect to the ceiling prices, not with respect to enforcement of private contracts *per se*. . . . [I]t is contemplated that FERC's implementation of the bill will be accomplished with minimal interference with contractual relationships.[23]

The Commission's interpretation of Section 101(b)(5) conforms with this view because it would not place the burden of interpreting contracts on the Commission. In contrast, the Tenth Circuit would use a statutory scheme for *deregulation* to justify an *expansion* of the Commission's regulatory oversight to include the interpretation and enforcement of private contracts.

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[23] *Natural Gas Policy Act Information Service*, ¶101:230, p. 3.

CONCLUSION

For the foregoing reasons, INGAA urges this Court to grant *certiorari* to correct the serious errors committed by the Tenth Circuit and to insure that the NGPA is allowed to operate as intended by Congress. Unless corrected, such errors will impose substantial injury upon interstate pipelines and gas consumers.

Respectfully submitted,

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September 21, 1987

(3)

No. 87-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION
Petitioner,

v.

MARTIN EXPLORATION MANAGEMENT CO., *et al.*
Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF FOR WILLIAMS NATURAL GAS COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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On Petitions For A Writ of Certiorari To The United States Court of Appeals For the Tenth Circuit

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MOTION OF WILLIAMS NATURAL GAS COMPANY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Williams Natural Gas Company (WNG) here respectfully moves for leave to file the attached brief as *Amicus Curiae* in support of the petitions for a writ of certiorari submitted in this case.

I.

INTEREST OF WILLIAMS NATURAL GAS COMPANY

The instant case involves the issue of whether Congress deregulated natural gas which is dually qualified under both regulated and deregulated Natural Gas

Policy Act (NGPA) categories. On this issue, WNG possesses a clear and direct interest.

In particular, WNG owns and operates a major interstate natural gas pipeline system under various certificates of public convenience and necessity issued by the Federal Power Commission (FPC) or its successor, the Federal Energy Regulatory Commission. WNG purchases gas under approximately 1100 gas purchase contracts and then transports and resells this gas primarily in Kansas and Missouri to distribution companies or to industrial customers served directly from its system. The distribution companies, in turn, resell this gas to approximately 2,900,000 ultimate customers.

Of the gas that WNG purchases under its approximately 1,100 contracts, substantial amounts of that gas dually qualifies under both regulated and deregulated categories. Indeed, as a result of the Tenth Circuit's decision at issue here, WNG, its customers and ultimate consumers will face substantially higher prices for this dually qualified gas. WNG estimates that these higher prices may cause over $100 million in additional costs for its past purchases and over $50 million in additional purchased gas costs for each future year.

II.

POSITION OF THE PARTIES

Pursuant to Supreme Court Rule 36.1, WNG contacted the active parties to the proceeding seeking their written consent. While WNG was able to obtain

the consent of the petitioners,[1] WNG was unable to obtain the written consent of a number of the parties who will likely oppose the petitions. Of these parties, Amoco Production Company expressly refused to give its written consent and others were at least initially noncomittal, thus necessitating the filing of this motion.

III.

WNG'S BRIEF AS *AMICUS CURIAE* SHOULD BE CONSIDERED BY THE COURT

As shown above, WNG has a clear interest in this matter in that it may face greater harm as a result of the Tenth Circuit's decision than any other interstate natural gas pipeline. Significantly, while the Tenth Circuit denied rehearing of its original order, the Court nonetheless recognized WNG's significant interest in this case by granting WNG's motion for leave to submit a brief as *amicus curiae* in support of the requests for rehearing of the court's March 9, 1987 decision in this case. Given this significant interest, WNG submits that it is necessary that it be allowed to submit the attached brief. Moreover, acceptance of this brief will help assure that the Court is fully apprised of all aspects of the important question presented.

WHEREFORE, WNG respectfully requests the Court to grant this motion and to accept and consider its attached brief as *Amicus Curiae* in support of the petitions in this case.

[1] The Federal Energy Regulatory Commission, Public Service Commission of the State of New York, Associated Gas Distributors, Consolidated Gas Transmission Corporation, Panhandle Eastern Pipe Line Company, and Tennessee Gas Pipeline Company.

Respectfully submitted,

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By________________________

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BRIEF FOR WILLIAMS NATURAL GAS COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Pursuant to Rule 19 and Rule 36 of the Rules of the Supreme Court of the United States, Williams Natural Gas Company (WNG) submits this brief as *amicus curiae* in support of the petitions for a writ of certiorari filed by: (1) the Federal Energy Regulatory Commission (Commission) together with the Solicitor General of the United States; and (2) Public Service Commission of the State of New York, Associated Gas Distributors, Consolidated Gas Transmission Corporation, Panhandle Eastern Pipe Line Company and Tennessee Gas Pipeline Company. These petitions challenge a decision of the United States Court of Appeals for the Tenth Circuit (Commission's Petition, Appendix A) in *Martin Exploration Man-*

agement Co. v. FERC, Nos. 84-2756, *et al.* (10th Cir. March 9, 1987), reversing the Commission's finding in Order No. 406[1] that natural gas which is dually qualified for both a regulated and a deregulated category would be considered deregulated under the Natural Gas Policy Act (NGPA).[2] As demonstrated below, this Court should grant the petitions for a writ of certiorari because the Tenth Circuit committed clear legal error on an issue of first impression involving matters of great importance to natural gas companies and consumers.[3]

INTEREST OF WILLIAMS NATURAL GAS COMPANY

WNG possesses a clear and direct interest in this case. WNG owns and operates a major interstate natural gas pipeline system under various certificates of public convenience and necessity issued by the Federal Power Commission (FPC) or its successor, the Federal Energy Regulatory Commission. WNG purchases gas under approximately 1100 gas purchase contracts and then transports and resells this gas primarily in Kansas and Missouri to distribution companies or to industrial customers served directly from its system. The distribution companies, in turn, resell this gas to approximately 2,900,000 ultimate consumers.

WNG purchases substantial amounts of gas dually qualified under both deregulated (*e.g.*, NGPA §§102(c)

[1] FERC Stats. & Regs., ¶30,614 (1984) contained in Commission's Petition, Appendix E. (App. E).

[2] 15 U.S.C. § 3301-3432.

[3] Pursuant to Rule 36, WNG obtained the written consent of the active parties to file this brief.

and 103(c))[4] and regulated (*e.g.*, NGPA §107(c)(5))[5] NGPA categories. Under Order No. 406, WNG was able to reduce the price of much of its dually qualified gas to measurably lower market oriented prices. The Tenth Circuit in *Martin Exploration*, however, reversed Order No. 406 in part. That reversal, if upheld, will result in substantially higher prices for dually qualified gas. WNG estimates that such higher prices may cause WNG, its customers and the ultimate consumers increased costs totalling over $100 million for past purchases and over $50 million in additional purchased gas costs for each future year.

REASONS FOR GRANTING THE PETITIONS

Where a petition for a writ of certiorari involves an important question of federal law that has never been previously resolved, this Court should grant the petition and resolve the question. *See Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana*, 125 S. Ct. 2587, 2612 n. 78 (1985). There can be no doubt that such is the case here. Indeed, the Commission's basic authority to implement Congressional desire for deregulation of certain categories of natural gas supplies is at issue and has been jeopardized by the Tenth Circuit's decision.

As shown below, the Tenth Circuit not only incorrectly decided this important question, but the lower

[4] 15 U.S.C. § 3312(c), covering "new" natural gas from new reservoirs, certain new OCS leases, or new wells drilled a certain distance from existing "marker" wells. 15 U.S.C. § 3313(c), covering "New onshore production wells."

[5] 15 U.S.C. § 3317(c)(5), covering gas that involved high cost production which the Commission found to present extraordinary risks or costs, and therefore provided higher ceiling prices.

court's decision will have a severe adverse impact on natural gas pipelines and consumers. Thus, this Court should grant the petitions.

A. The Tenth Circuit Incorrectly Interpreted The NGPA

1. The Tenth Circuit's decision was based on its conclusion that Section 121, 15 U.S.C. §3331, is unclear as to the issue in this case.[6] Contrary to the Tenth Circuit's interpretation, however, Section 121 is unambiguous on this point and shows that gas dually qualified in regulated and deregulated categories must be considered deregulated. In particular, Section 121 expressly states that:

> [T]he provisions of Part A of this subchapter respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e) of this section, cease to apply effective January 1, 1985.

15 U.S.C. §3331.

Since the "provisions of Part A of this subchapter" refer to the various ceiling prices in Title I of the NGPA, this section deregulated specific categories of natural gas. These categories included new natural gas covered by NGPA Section 102(c) and new onshore production wells covered by NGPA Section 103(c), 15 U.S.C. §3313(c). Much of the dually qualified gas qualifies under these two deregulated categories. The only two enumerated exceptions to such deregulation involved subparts (d) and (e) of Section 121 which relate to certain Alaska natural gas and indefinite price escalators and are clearly not applicable to this case.

[6] Commission's Petition, Appendix A at 11a.

Thus, the effect of the lower court's ruling is to add an additional exception to Section 121 for dually qualified gas. This was clear error because as a general principle of statutory construction, "the expression in a statute of certain powers, exceptions, designated persons or things, etc., implies the exclusion of others not mentioned." *Public Service Co. of Colorado v. FERC*, 754 F.2d 1555, 1567 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 849 (1986); *see also American Bank and Trust Co. v. Dallas County*, 463 U.S. 855, 864 (1983); *Andrus v. Allard*, 444 U.S. 51, 56 (1979).

2. Furthermore, the legislative history of the NGPA evidences Congressional intent that dually qualified gas be deregulated effective as of January 1, 1985. For example, Senator Bartlett, in a discussion of the conference report, stated:

> [I]n informal discussions on the floor it has been asserted that stripper[7] wells are deregulated. This is true *only to the extent that such wells are otherwise new wells and would be deregulated anyway*. Their character as stripper wells, as shown under Section 121, does not get them deregulated in any way.

Cong. Rec. S. 15997 (September 25, 1978), 124 Cong. Rec. 31387 (1978) (emphasis added). Thus, Senator Bartlett agreed with the Commission that gas dually qualified in deregulated and regulated categories will be deregulated.

3. Finally, an analysis of NGPA Section 101(b)(5) demonstrates that the Tenth Circuit's interpretation

[7] Stripper wells receive prices under NGPA Section 108 (15 U.S.C. § 3318).

is incorrect.[8] The court below concluded that Section 101(b)(5) unambiguously provides that the price of dually qualified gas would be the higher of the contract price or the regulated price.[9] That is, the producer is allowed to switch back and forth between the regulated and contract price and, is, in effect, guaranteed a minimum price for its gas.

Contrary to the lower court's holding, Section 101(b)(5) does not unambiguously allow producers to obtain the highest price for dually qualified gas where at least one qualifying category involves deregulated gas.[10] Indeed, the legislative history underlying Section 101(b)(5) shows clearly that Section 101(b)(5) applies only when two *regulated* categories are involved, not when gas qualifies under one regulated and one deregulated category.

Representative Dingell, the floor manager of the conference report in the House, together with Representatives Staggers, Ashley, Eckhardt and Wilson prepared "a comprehensive explanatory statement"

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[8] 15 U.S.C. § 3311(b)(5), providing in full:

> (5) Sales qualifying under more than one provision. If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

[9] Commission's Petition, Appendix A at 13a-15a.

[10] Where a statutory provision is ambiguous, it is appropriate to employ legislative history, including statements by sponsors of the legislation, to resolve such ambiguity. *See Blum v. Stenson*, 465 U.S. 886, 896 (1984); *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

subsequent to the filing of the conference report in the Senate, in order to answer "a number of questions [which] have arisen regarding the meaning of certain sections" and to "assist members of the House during their consideration." Cong. Rec. H. 13115 (October 14, 1978), 124 Cong. Rec. 38362 (1978). In pertinent part, this explanatory statement provided that:

> Questions have arisen regarding the meaning of Section 101(b)(5). *This rule is intended to facilitate resolution of which ceiling price may apply if more than one ceiling price rule appears applicable.* Whichever ceiling price could result in the highest price is the applicable maximum lawful price.

Cong. Rec. H. 13116 (October 14, 1978), 124 Cong. Rec. 38363 (1978) (emphasis added).

The explanatory statement, therefore, evidences Congressional intent that Section 101(b)(5) is only applicable where gas is subject to more than one regulated price because these Congressional statements refer to "ceiling price." The term "ceiling price" has no relevance to deregulated gas, for under the NGPA, ceiling price only pertains to regulated gas. *See* 15 U.S.C. §§3312-3319.

Therefore, the Tenth Circuit's decision was based on a clearly erroneous reading of the NGPA.

B. This Is Clearly A Matter Of Substantial Importance To Natural Gas Pipelines, Their Customers, And Millions Of Ultimate Natural Gas Consumers

There can be no doubt that the Tenth Circuit's action will result in the payment by natural gas pipelines of hundreds of millions of additional dollars for certain categories of natural gas. Most, if not all, of

these costs will in turn be borne by customers of natural gas pipelines who deliver natural gas to the ultimate consumer. The Commission (Petition at 22) estimated that the 1985-1987 cost of *Martin Exploration*, if upheld, will be approximately $300 million with costs continuing to mount thereafter. And, as discussed above, WNG estimates that the impact on WNG and its customers may be approximately $100 million for past periods and $50 million per year for subsequent years. Thus, the questions presented in this case are of considerable importance and the petitions must be granted.

CONCLUSION

For the reasons set forth above, this Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit.

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September 21, 1987

Supreme Court of the United States

October Term, 1987

Federal Energy Regulatory Commission,
Petitioner,
v.
Martin Exploration Management Company, *et al.*,
Respondents.

Public Service Commission of the
State of New York, *et al.*,
Petitioners,
v.
Martin Exploration Management Company, *et al.*,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

RESPONDENT CNG TRANSMISSION CORPORATION'S BRIEF IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Nos. 87-363 and 87-364

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK, *et al.*,
Petitioners,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit**

**RESPONDENT CNG TRANSMISSION CORPORATION'S
BRIEF IN SUPPORT OF PETITIONERS**

STATEMENT OF THE CASE

Respondent CNG Transmission Corporation, formerly Consolidated Gas Transmission Corporation ("CNG Transmission"), is in general agreement with and adopts

the statements and arguments set forth in the briefs of Petitioners Federal Energy Regulatory Commission ("FERC"), and Public Service Commission of the State of New York, *et al.* ("PSC").[1]

This case arises under the Natural Gas Policy Act of 1978 ("NGPA").[2] Title I, Subtitle B of the NGPA creates a scheme of phased price deregulation for most categories of natural gas. *Public Service Commission v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 336 n.14 (1983). The NGPA generally establishes maximum lawful prices for first sales of natural gas in a number of gas categories. The categories are defined by Subtitle A of Title I and are not mutually exclusive—*i.e.*, certain natural gas can qualify simultaneously under more than one provision. There is also overlap between categories that remain subject to price ceilings ("price regulated gas") and categories that are free from any maximum lawful price ("price deregulated gas").

The FERC initiated a rulemaking proceeding in 1984 to implement the statutory timetable for price deregulation of major categories of new gas. (App. 34a-52a). The FERC construed the NGPA to require that natural gas that is qualified for both price-regulated and price-deregulated status under the NGPA ("dually-qualified gas") be treated as price deregulated. (App. 73a-82a). On appeal of this rulemaking the United States Court of Appeals for the Tenth Circuit rejected the FERC's construction. The court held instead that producers of natural gas could choose whatever statutory category afforded them the highest price under their contracts and market conditions. (App. 1a-24a).

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[1] Pursuant to U.S. Sup. Ct. Rule 28, CNG Transmission includes as an Addendum hereto a listing naming all parent companies, subsidiaries and affiliates of Respondent CNG Transmission.

[2] 15 U.S.C. §§ 3311(b)(5), 3317(c)(5), 3331, 3332 (1982).

Although the court of appeals acknowledged that as a result of its decision considerable gas will be sold at higher regulated prices when contract prices geared to market conditions are at a lower level, it concluded nonetheless that this result was a matter for legislative rather than judicial overview. (App. 23a-24a). The court of appeals denied rehearing and the suggestion for rehearing *en banc.* (App. 29a-31a).

SUMMARY OF ARGUMENT

The court of appeals' conclusion that producers may shift between regulated and deregulated categories directly contravenes Congress' long-term goals. In contrast, the FERC's orders mandating the price deregulation of dually-qualified natural gas are fully consistent with congressional objectives in enacting the NGPA. Congress sought to correct the serious market distortions created by regulation of natural gas prices under the Natural Gas Act ("NGA"). The NGPA, therefore, included a plan of phased price deregulation that would gradually increase the role of market forces in determining natural gas prices. Under the interpretation of the court of appeals, real decontrol of much natural gas would never occur, and prices would be supported at artificially high levels.

The decision of the court of appeals, if permitted to stand, will impose enormous additional costs on purchases of natural gas and will result in substantial prejudice to natural gas pipelines and their customers. CNG Transmission, a natural gas pipeline serving 3,000,000 customers in New England and the Mid-Atlantic states, has estimated that as a result of this decision its gas purchase costs will increase substantially. This increase will occur at a time of surplus natural gas deliverability, a result directly contrary to the establishment of prices by market forces rather than government regulation. The decision of the court of appeals should therefore be reversed.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS INCONSISTENT WITH THE CONGRESSIONAL INTENT UNDERLYING THE NGPA

The court of appeals' conclusion that producers have the right to choose between regulated and deregulated pricing status directly conflicts with Congress' objectives in adopting the NGPA. In the NGPA, Congress sought to correct the market distortions that had accompanied the regulation of natural gas prices under the NGA. *Mid-Louisiana*, 463 U.S. at 330-31. Congress believed that the NGA's price controls had created an imbalance in supply and demand by holding regulated prices below market levels and by preventing the free market from making long-term adjustments. *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409, 420 (1986). Through the NGPA, Congress attempted to give market forces a more significant role in determining the price and, consequently, the supply and demand of natural gas. *Id.* at 420-21. This change in regulatory perspective reflected Congress' belief that the free market would provide consumers with the most dependable and the most reasonably priced supply of natural gas. To this end, the NGPA provided both for interim incentive prices and for phased price deregulation. *Id.*

In light of the broad policies that Congress sought to implement by passage of the NGPA, the court of appeals' decision, which turns on its interpretation of NGPA section 101(b)(5), defies logic. NGPA section 101(b)(5) provides:

> If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or any exemption from such price with respect to any first sale of such natural gas, the provision which *could* result in the highest price shall be applicable.[3]

In its rulemaking, the FERC held that section 101(b)(5) supports its construction of the NGPA: gas that is qualified for both price-regulated and price-deregulated status would be treated as deregulated. According to the FERC, a deregulated price "always *could* result in a *higher* price than a regulated price . . ." (App. 79a) (emphasis in original). The court of appeals rejected this straight-forward analysis on the ground that the price of *regulated* gas "could" also be higher than the price of *deregulated* gas. (App. 15a-16a). The court of appeals' proposition contravenes any meaningful understanding of the statutory language. The more logical presumption—particularly at the time that Congress enacted the NGPA—is that a deregulated price "could" be higher than a price subject to regulatory controls.

The court of appeals further held that the term "could" in section 101(b)(5) must be interpreted by examining the prices to be paid in each actual sales transaction. (App. 16a). This approach contravenes the statute's price deregulation timetable and its mandate that contracts determine natural gas prices. As the FERC recognized, "whether the *contract* allows the producer to collect a price higher than a regulated price is a contractual issue, not an issue raised by the deregulation scheme of the NGPA." (App. 111a) (emphasis in original). An actual comparison of applicable prices at each moment to determine the regulatory status of sales of dually-qualified gas is clearly outside the deregulated, market-based pricing scheme envisioned by Congress.

Additionally, the court of appeals maintained that by focusing on the NGPA's price deregulation provisions,

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[3] 15 U.S.C. § 3311(b)(5) (1982) (emphasis added). (Hereinafter cited as NGPA Section 101(b)(5)).

the FERC improperly overlooked congressionally-mandated incentives aimed at increasing gas supplies. (App. 22a). The court of appeals failed to appreciate, however, that the prospect of price deregulation was also an incentive to the exploration and development of additional gas reserves by producers. (*See* App. 74a n.10). Moreover, price deregulation was intended to eliminate the need for continued incentives because the market would provide sufficient incentives to balance supply and demand.

Under the court of appeals' reading of NGPA section 101(b)(5), Congress' ultimate goal of achieving an increasingly decontrolled market for natural gas would be frustrated because deregulation would never fully occur with respect to dually-qualified gas. At any time, producers could elect price control over decontrol, depending upon which option suited them best. Thus, in times of excess supply, producers would be shielded from the lower prices dictated by the market. On the other hand, producers could take advantage of higher prices caused by a shortage in supply. The court of appeals' decision is therefore contrary to the congressional effort to allow market forces to determine prices and "to eliminate the distortive effects that NGA price control had had on supply and demand." *Transcontinental Gas Pipe Line Corp.*, 474 U.S. at 424, n.6.

II. THE COURT OF APPEALS' DECISION WILL HAVE A SUBSTANTIAL UNWARRANTED ADVERSE IMPACT ON NATURAL GAS PIPELINES AND THEIR CUSTOMERS

Respondent CNG Transmission, a natural gas pipeline serving distributors in New York, Ohio, Pennsylvania, and West Virginia, purchases natural gas that is qualified for both a regulated and a deregulated price category. Under the court of appeals' decision, prices for dually-qualified gas will be held at artificially high levels. Producers will presumably elect price regulated categories because regulated prices are higher than the current prices available under contract provisions applicable in the event of deregulation. CNG Transmission estimates that, as the result of these producer elections, the cost of gas that CNG Transmission purchases will increase substantially, notwithstanding the current surplus of natural gas supply deliverability.

Additionally, many existing gas purchase contracts between CNG Transmission and producers provide for price renegotiation if deregulation occurs. Under the decision of the court of appeals, gas reserves subject to these contracts may never be in a deregulated category because deregulated status depends on a renegotiated price that is higher than the regulated price. Since the prerequisite for a renegotiated price is deregulation itself, such price renegotiation will not occur. Although the court of appeals recognized this anomalous situation, it dismissed the problem in a footnote, as if it would have little overall impact. (App. 16a-17a, n.11). A contrary conclusion is true for CNG Transmission which purchases significant amounts of gas under contracts with provisions that lead to this "Catch-22." The problem affects 60 percent of CNG Transmission's producer gas eligible for deregulation. Although CNG Transmission's contracts anticipate deregulation, this gas will remain subject to regulatory controls and, consequently, to artificially higher prices.

The FERC estimates that the nationwide, 1985-1987 cost of the court of appeals' decision in higher natural gas prices is approximately $300 million. The effects will be further reaching, however, because many gas purchase contracts contain take-or-pay provisions. To the extent that gas is rendered unmarketable by the artifically higher prices, it could be shut-in. Thus, higher prices will aggravate both the current surplus and the enormous take-or-pay burden faced by pipelines. *See Associated Gas Distributors v. FERC*, 824 F.2d 981, 1023 (D.C. Cir. 1987).

The higher annual gas costs flowing from the court of appeals' decision will be passed on to ultimate consumers by virtue of NGPA section 601(c)(2), 15 U.S.C. 3431 (c)(2) (1982), which provides for guaranteed pass-through of NGPA-determined prices, absent fraud, abuse, or similar grounds. Thus, if the court of appeals' decision is allowed to stand, the congressional aim of providing customers with adequate supplies of gas at reasonable prices will be frustrated.

CONCLUSION

The court of appeals' interpretation of NGPA section 101(b)(5) is inconsistent with Congress' long-term goals in enacting the NGPA. The judgment of the court of appeals should be reversed.

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ADDENDUM REQUIRED BY RULE 28

Respondent CNG Transmission Corporation is a wholly-owned subsidiary of Consolidated Natural Gas Company. Other subsidiaries of Consolidated Natural Gas Company are:

CNG Coal Company;
CNG Development Company;
CNG Energy Company;
CNG Producing Company;
CNG Research Company;
CNG Trading Company;
Consolidated Natural Gas Service Company, Inc.;
Consolidated System LNG Company;
Hope Gas, Inc.;
The East Ohio Gas Company;
The Peoples Natural Gas Company;
The River Gas Company;
West Ohio Gas Company.

Nos. 87-363 and 87-364

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

PUBLIC SERVICE COMMISSION OF NEW YORK, ET AL., PETITIONERS

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

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QUESTIONS PRESENTED

1. Whether, as the Federal Energy Regulatory Commission determined, natural gas that is covered by two provisions of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*—one of which sets a ceiling on prices, the other of which declares prices deregulated—must be treated as deregulated gas under the NGPA; or whether, instead, producers may choose, perhaps daily, the classification that, under current market conditions and their contracts, affords them the highest price.

2. Whether the Commission's ruling that most "new tight formation gas" under Section 107(c)(5) of the NGPA is automatically new gas under Section 102 or 103 of the Act is consistent with the Commission's authority under the NGPA.

PARTIES TO THE PROCEEDINGS

The petitioner in No. 87-363 is the Federal Energy Regulatory Commission. The respondents are Martin Exploration Management Company; Colorado Energy Corporation; Phillips Petroleum Company; Phillips Oil Company; Exxon Corporation; Shell Off-Shore, Inc.; Shell Western E & P, Inc.; Independent Oil & Gas Association of West Virginia; Amoco Production Company; Arco Oil & Gas Company; Ohio Oil and Gas Association; Independent Oil and Gas Association of West Virginia; Gulf Oil Corporation, successor to Chevron, U.S.A., Inc.; Union Oil Company of California; Champlin Petroleum Company; Pennzoil Company; Pennzoil Oil & Gas, Inc.; Pennzoil Producing Company; Placid Oil Company; Tennessee Gas Pipeline Company, a division of Tenneco, Inc.; Pacific Gas & Electric Company; Amoco Production Company; Transok, Inc.; Oklahoma Natural Gas Company, a division of Oneok, Inc.; Associated Gas Distributors; Public Service Commission of the State of New York; Pacific Lighting Gas Supply Company; Southern California Gas Company; Consolidated Gas Transmission Corporation; Panhandle Eastern Pipe Line Company; Cities Service Oil and Gas Corporation; Grace Petroleum Corporation; Valero Transmission Company; BHP Petroleum Company, Inc., successor to Monsanto Oil Company; Texas Eastern Transmission Corporation; Transwestern Pipeline Company; United Gas Pipe Line Company; United Texas Transmission Company; and Texas Gas Transmission Corporation.

The petitioners in No. 87-364 are the Public Service Commission of the State of New York; Consolidated Gas Transmission Corp.; Tennessee Gas Pipeline Co., a Division of Tenneco Inc.; Panhandle Eastern Pipe Line Co.; and Associated Gas Distributors. The respondents are all the other parties listed in the preceding paragraph.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-363

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

No. 87-364

PUBLIC SERVICE COMMISSION OF NEW YORK, ET AL., PETITIONERS

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a)[1] is reported, as modified, at 813 F.2d 1059. The order of the court of appeals modifying the original opinion (Pet. App. 29a-31a) is not separately reported. The notice of proposed rulemaking of the Federal Energy Regulatory Commission (FERC) (Pet. App. 34a-60a) is reported at 49 Fed. Reg. 36399. The opinion accompanying issuance of

[1] "Pet. App." refers to the appendix to the petition in No. 87-363.

the final rule by FERC (Pet. App. 61a-103a) is reported at 49 Fed. Reg. 46874 and F.E.R.C. Stats. and Regs. para. 30,662. The FERC opinion denying rehearing in relevant part (Pet. App. 104a-126a) is reported at 49 Fed. Reg. 50637.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a-33a) was entered on March 9, 1987. Petitions for rehearing were denied, with modifications of the original decision (Pet. App. 29a-31a), on May 1, 1987. On July 22, 1987, Justice White extended the time for filing petitions for a writ of certiorari to and including August 31, 1987, and the petitions were filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 101(b)(5) of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3311(b)(5), provides:

> If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

Sections 107(c)(5), 121, and 122 of the NGPA, 15 U.S.C. 3317(c)(5), 3331, 3332, are set out in the appendix to the petition in No. 87-363 (Pet. App. 127a-131a).

Section 270.208 of 18 C.F.R. provides:

> First sales of natural gas that is deregulated natural gas as defined in § 272.103(a) is [*sic*] price deregulated and not subject to the maximum lawful prices of the NGPA, regardless of whether the gas also meets the criteria for some other category of gas subject to a maximum lawful price under Subtitle A of Title I of the NGPA.

STATEMENT

The Commission construed the Natural Gas Policy Act (NGPA or Act), in accordance with the Act's overall scheme of phased-in deregulation, to require that producers treat as deregulated any natural gas that is qualified for such status even if it is also qualified for price-regulated status. It also ruled that certain gas eligible for special pricing under Section 107(c)(5) of the Act, 15 U.S.C. 3317(c)(5), is automatically qualified for deregulated treatment under Section 102 or 103, 15 U.S.C. 3312, 3313. The court of appeals rejected the Commission's construction of the Act (Pet. App. 10a) and held that producers of natural gas could choose whatever statutory category affords them the highest price under their contracts and market conditions at any particular moment, even if the choice means returning deregulated gas to regulated status (*id.* at 17a, 30a). In explaining that holding, the court also rejected the Commission's ruling on Section 107(c)(5) gas.

A. *Statutory Background*

1. In 1938, Congress enacted the Natural Gas Act, 15 U.S.C. 717 *et seq.*, to govern certain aspects of the interstate natural gas industry. This Court held in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), that the Natural Gas act applied to producers' sales, at the wellhead, of gas for resale in interstate commerce. Accordingly, from the mid-1950s until 1978, the Federal Energy Regulatory Commission (and its predecessor, the Federal Power Commission) established just-and-reasonable ceiling rates for such producer sales, pursuant to Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c, 717d. Those rates were based largely on the historical costs of production. See, *e.g.*, H.R. Rep. 95-543, 95th Cong., 1st Sess. Pt. 2, at 386 (1977); 121 Cong. Rec. 31982 (1975) (Sen. Stevenson).

At least by the early 1970s, the federally established rates were lower than the prices producers could command for gas sold in unregulated intrastate markets. See *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 327-331 (1983). It quickly "became clear that the existing regulatory structure was inadequate" (Pet. App. 3a). The increasing costs of alternative fuels and the benefits of natural gas for environmental reasons generally raised demand for natural gas; and the combination of price ceilings applicable to interstate sales under the Natural Gas Act and the absence of similar constraints on intrastate sales artificially reduced supply and inflated demand in the interstate market. *Ibid.*; Breyer & MacAvoy, *The Natural Gas Shortage and the Regulation of Natural Gas Producers*, 86 Harv. L. Rev. 941 (1973); Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101, 106-112 (1980). The result of this imbalance in supply and demand was the emergence of a chronic natural gas shortage. See *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 626 (1972).

Both houses in the 94th Congress (1975-1976) passed bills addressed to the problem. Both recognized that regulated prices in the interstate market were "unnaturally low" (121 Cong. Rec. 31201 (1975) (Sen. Glenn); *id.* at 30935 (Sen. Bayh), 31369 (Sen. Stevenson)) and that the different treatment of the interstate and intrastate markets was a substantial cause of the shortages in the interstate market (see, *e.g.*, H.R. Rep. 94-732, 94th Cong., 1st Sess. 5-8, 48, 54 (1975); 121 Cong. Rec. 31223 (1975) (Sen. Fannin)). The two houses, however, adopted contrary approaches to the problem.

The Senate, responding to numerous calls for deregulation of prices led by the Senators from the gas-producing states (see, *e.g.*, 121 Cong. Rec. 30735-30737 (1975) (Sen. Bartlett of Oklahoma, Sen. Long of Louisiana); *id.* at 30898 (Sen. Bartlett), 30908 (Sen. Bentsen of Texas),

30914 (Sen. Tunney of California), 31230-31234 (bill proposed by Sen. Pearson of Kansas and Sen. Bentsen); *id.* at 31223 (Sen. Fannin of Arizona)), passed a bill (S. 2310, 94th Cong., 1st Sess. (1975)) that generally would have deregulated producer sales within one year for new onshore gas and within five years for new offshore gas (see 121 Cong. Rec. 33655-33659 (1975)). In so doing, the Senate refused to adopt proposals to extend price regulation from the interstate to intrastate markets (*id.* at 31370-31374, 31983, 32299, 33636). The House took roughly the opposite approach. It rejected a deregulation proposal (122 Cong. Rec. 2645 (1976)) and passed a bill (H.R. 9464, 94th Cong., 2d Sess. (1976)) that would have deregulated certain sales by small "independent" producers, extended federal price regulation to intrastate markets, and introduced production incentives into the setting of federal ceilings (122 Cong. Rec. 2385-2388 (1976)). Both the House and Senate bills died in the 94th Congress.[2]

2. Against that background, in 1977, during the first session of the 95th Congress, the House and Senate again each passed bills designed to address the problem. Again

[2] Attempts by producers to obtain partial or complete deregulation were twice before almost successful. In 1950, following this Court's decision in *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682 (1947), Congress passed a bill (H.R. 1758, 81st Cong., 2d Sess.) that would have deregulated producer sales to interstate pipelines with which the producer was not affiliated. President Truman vetoed the bill, citing the need for continued regulation (see 1950 Pub. Papers 257 (Apr. 15, 1950)). In 1956, in response to this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin*, *supra*, Congress narrowly passed a bill (H.R. 6645, 84th Cong., 2d Sess.) that would have deregulated all producer sales (see 101 Cong. Rec. 11859-11861 (1955) (describing bill)). President Eisenhower vetoed the bill, explaining that, although he was in sympathy with its objectives, certain producers had engaged in ethically questionable practices in urging at least one member of Congress to vote for the bill (see 1956 Pub. Papers 256-257 (Feb. 17, 1956)).

both houses recognized that interstate gas had been "underpriced" (H.R. Rep. 95-543, *supra*, at 7; S. Rep. 95-436, 95th Cong., 1st Sess. 20 (1977); 123 Cong. Rec. 29783 (1977) (Sen. Hansen); *id.* at 29786 (Sen. Pearson)) and that the distinction between the interstate and intrastate markets should be broken down (see, *e.g.*, H.R. Rep. 95-543, *supra*, at 10, 19, 392; S. Rep. 95-436, *supra*, at 2, 21). And again, the debate was between those favoring deregulation and those favoring extension of federal price ceilings into the intrastate markets (see H.R. Rep. 95-543, *supra*, at 391-392), with the House adopting the latter view and the Senate adopting a bill that moved toward deregulation.

The House bill (H.R. 8444, 95th Cong., 1st Sess. (1977)), part of a broader National Energy Act proposed by President Carter, would have extended regulatory controls by imposing uniform price regulation, at levels intended to encourage production, on all natural gas, interstate and intrastate (123 Cong. Rec. 27244-27245 (1977)). See H.R. Rep. 95-543, *supra*, at 10, 19, 392-393; see also H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. 67 (1978) (describing House bill). In the course of considering the bill, the House defeated a proposal that would have deregulated new onshore gas immediately and new offshore gas in 1982 (123 Cong. Rec. 26448-26450 (1977) (Brown amendment); *id.* at 25914 (describing amendment), 26452 (same), 26482-26483 (amendment defeated)). The Senate took a "significantly different approach" (H.R. Conf. Rep. 95-1752, *supra*, at 68). Its bill (S. 2104, 95th Cong., 1st Sess. (1977)) would have left intrastate gas unregulated and would have deregulated new onshore natural gas in two years and new offshore gas in 1982, with certain price controls in the interim (123 Cong. Rec. 32306 (1977)). See *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 331-332; H.R. Conf. Rep. 95-1752, *supra*, at 68. The Senate passed this bill in lieu of

the proposed Committee bill, which was similar to the House bill and did not provide for deregulation (see S. Rep. 95-436, *supra*, at 2-5)), and in lieu of a proposal (made initially by the sponsors of the ultimately enacted bill) for faster deregulation of new onshore gas (see 123 Cong. Rec. 29784-29786, 31163-31165 (1977)).

The conflict between the houses went to a Conference Committee, which proposed an entirely new bill roughly one year later (H.R. 5289, 95th Cong., 2d Sess. (1978); H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. (1978)). The conference bill struck a compromise between the House's proposed increased regulation and the Senate's proposal for deregulation of new gas within two to five years (see H.R. Conf. Rep. 95-1752, *supra*, at 67-68; 124 Cong. Rec. 38361 (1978) (remarks of Rep. Dingell); *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 331). The bill broke down the distinction between interstate and intrastate gas and brought all gas under a single " 'national market price regulatory scheme.' " *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 421 (1986) (quoting Haase, *The Federal Role in Implementing the Natural Gas Policy Act of 1978*, 16 Hous. L. Rev. 1067, 1079 (1979)). It removed large quantities of gas from the entire regulatory scheme of the Natural Gas Act, and with respect to price in particular, it replaced Commission-set ceilings (at "just and reasonable" rates) with ceilings generally set directly by statute, several designed to provide incentives for new production. The bill also mandated "deregulation of most categories of natural gas" (H.R. Conf. Rep. 95-1752, *supra*, at 68) after transition periods of up to nine years. See Note, *supra*, 59 Tex. L. Rev. at 116. Enacted as the NGPA, the bill thus "comprehensively and dramatically changed the method of pricing natural gas produced in the United States" (*Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 322).

3. Title I of the NGPA creates the scheme of "[p]hased deregulation" (124 Cong. Rec. 38361 (1978) (Rep. Dingell)) in two stages. Subtitle A (NGPA §§ 101-110, 15 U.S.C. 3311-3320) defines numerous categories of natural gas and establishes (or, in a few exceptional cases, permits the Commission to set) a gradually increasing "maximum lawful price" for wellhead "first sale[s]" of gas in each category.[3] Subtitle B (NGPA §§ 121-123, 15 U.S.C 3331-3333) then provides for the removal of certain of those ceilings after periods ranging from several months to nine years.

More particularly, the categories of natural gas defined by Subtitle A,[4] aside from a catch-all residual category (NGPA § 109, 15 U.S.C. 3319), fall roughly into three groups. First, and of primary importance to these cases, four provisions set prices (or, in one instance, authorize the Commission to do so) that are designed to furnish incentives for new production: Sections 102 and 103, 15 U.S.C. 3312, 3313, cover certain new natural gas[5]; Section 107, 15 U.S.C. 3317, covers certain "high-cost" natural gas[6]; Section 108, 15 U.S.C. 3318, covers gas from certain

[3] A "first sale" is most often, but not exclusively, a sale by the producer of the natural gas (NGPA § 2(21), 15 U.S.C. 3301(21)).

[4] The category-defining sections are Sections 102-109, 15 U.S.C. 3312-3319. Section 101, 15 U.S.C. 3311, defines the annual inflation adjustment factor and other "[r]ules of general application" relevant to the remainder of the Act. Section 110, 15 U.S.C. 3320, concerns the treatment of state severance taxes and certain production-related costs.

[5] Section 102, 15 U.S.C. 3312, covers gas from a new reservoir, from certain Outer Continental Shelf leases, or from a new well drilled sufficiently far from certain existing "marker" wells. Section 103, 15 U.S.C. 3313, covers certain new onshore production wells.

[6] Section 107, 15 U.S.C. 3317, defines four categories of high-cost gas (Subsections (c)(1) through (4)) and allows the Commission to designate other gas that is especially costly or risky to produce (Subsection (c)(5)).

low-producing "stripper" wells.[7] Second, two provisions (§§ 104, 106(a), 15 U.S.C. 3314, 3316(a)) cover "old" interstate gas – gas dedicated to interstate commerce prior to the NGPA's effective date or sold under "rollover" interstate contracts; those provisions set non-incentive, consumer-protective price ceilings based on the Natural Gas Act. Third, two provisions (§§ 105 and 106(b), 15 U.S.C. 3315, 3316(b)) cover "old" intrastate gas, defined analogously to "old" interstate gas, and set price ceilings tied to those for "new" Section 102 gas.

The central provision of Subtitle B is Section 121, 15 U.S.C. 3331, which mandates a three-stage elimination of price ceilings for certain of the categories of natural gas specified in Subtitle A. First, pursuant to Section 121(b), 15 U.S.C. 3331(b), price ceilings were removed on November 1, 1979, for the "high-cost" gas defined by Section 107(c)(1)-(4), 15 U.S.C. 3317(c)(1)-(4), which was the gas Congress believed to be most in need of immediate production incentives (see 124 Cong. Rec. 28633 (1978) (Sen. Jackson)). Next, and most important for these cases, pursuant to Section 121(a), 15 U.S.C. 3331(a), price ceilings were eliminated on January 1, 1985, for certain of the incentive-priced gas qualifying under Sections 102 and 103 ("new" gas) and under Sections 105 and 106(b) ("old" intrastate gas), 15 U.S.C. 3312, 3313, 3315, 3316(b).[8] Finally, pursuant to Section 121(c), 15 U.S.C. 3331(c), certain other "new" Section 103 gas was deregulated on July 1, 1987.[9]

[7] A "stripper" well is one that produces 60 Mcf or less per day. See NGPA § 108(b), 15 U.S.C. 3318(b); NGPA § 2(29), 15 U.S.C. 3301(29) (defining "Mcf").

[8] Certain "old" intrastate gas covered by Section 105 continues to be subject to price ceilings. See NGPA § 121(e), 15 U.S.C. 3331(e).

[9] Section 121(a), 15 U.S.C. 3331(a), states: "Subject to the reimposition of price controls as provided in section 122, the provisions of subtitle A respecting the maximum lawful price for the first sale of

Some gas, including "old" interstate gas, is never deregulated under the NGPA. Most notably for purposes of these cases, certain "high-cost" gas (§ 107(c)(5), 15 U.S.C. 3317(c)(5)) and "stripper well" gas (§ 108, 15 U.S.C. 3318) remains subject to price ceilings. In addition, the deregulation process established by Section 121 could have been delayed. Section 122, 15 U.S.C. 3332, gives the President and Congress an option for a one-time 18-month reimposition of price controls. That option expired on June 30, 1987, without having been invoked.

4. The categories defined by the provisions of Subtitle A overlap: substantial quantities of natural gas can qualify simultaneously under more than one provision. What is important for these cases is that, in addition to the overlap of several regulated categories, there is overlap between categories that remain subject to price ceilings (regulated gas) and categories that are free from any ceiling (deregulated gas). For example, the categories defined by Sections 107(c)(5) and 108, 15 U.S.C. 3317(c)(5), 3318 (certain high-cost natural gas and stripper-well gas), which remain subject to price ceilings, overlap significantly with the new-gas categories defined by Sections 102 and 103, 15 U.S.C. 3312, 3313, which are now deregulated. See Pet. App. 43a, 73a.[10]

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each of the following categories of natural gas shall, except as provided in subsections (d) and (e), cease to apply effective January 1, 1985 * * *." Subsections (b) and (c) are worded in similar fashion.

Subsection (d) is not relevant to these cases. Subsection (e) places a ceiling on certain gas (§ 105(b)(3), 15 U.S.C. 3315(b)(3)) that otherwise would be deregulated under Subsection (a). See note 32, *infra*.

[10] Pursuant to NGPA § 503, 15 U.S.C. 3413, producers must obtain rulings from certain state or federal "jurisdictional" agencies, subject to Commission review, in order to "qualify" their gas for sale in particular categories. Obtaining two qualifications is permitted. See 124 Cong. Rec. 38364 (1978) (explanatory statement on conference bill by Reps. Dingell, Staggers, Ashley, Eckhardt, and Wilson).

The Commission's regulations implementing the Section 503 requirement (18 C.F.R. Pt. 274) designate different jurisdictional agencies for gas produced from wells on the Outer Continental Shelf, on federal lands within a state, and on other lands within a state (18 C.F.R. 274.501). The regulations also set forth rules governing the filings producers must make with the jurisdictional agencies, and those rules vary according to the designation sought by the producer (18 C.F.R. 274.201-274.208).

Recognizing that the Subtitle A categories overlap, Congress included in the NGPA a provision addressed to the general question of gas qualifying in more than one category. Section 101(b), 15 U.S.C. 3311(b), sets forth "Rules of general application." Section 101(b)(5) states:

> Sales qualifying under more than one provision.— If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.[11]

B. ***The Commission's Rulings***

As the principal deregulation date (January 1, 1985) approached, the Commission found it necessary to consider the proper treatment of gas that is qualified for both regulated and deregulated treatment. At the time the NGPA was enacted in 1978, Congress—indeed, virtually all participants in the legislative process—assumed that market prices would be higher than the statutory ceilings. See Pet. App. 22a-23a. It was, accordingly, also clearly assumed that producers would prefer deregulated treat-

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[11] The Conference Report explains (H.R. Conf. Rep. 95-1752, *supra*, at 74):

> The conference agreement provides that if natural gas qualifies under more than one price category, the provisions [*sic*] that permit the seller to obtain the highest price applies. If a seller wishes to change the category under which production from a given well qualifies, he must apply to the appropriate State or Federal agency with authority to make determinations under section 503.

ment to the ceilings set in the statute. By the end of 1984, market prices had fallen drastically, and the 1978 assumptions about producer preferences had been reversed. See *ibid.* Consequently, many producers preferred regulated to deregulated treatment for gas that might qualify for both. See *id.* at 73a-78a.[12]

In September 1984, the Commission proposed a regulation to determine the legal treatment of gas that is qualified for both deregulated and regulated treatment (dual-qualified regulated-deregulated gas).[13] Pet. App. 43a-45a. After receipt of comments, the Commission, in November 1984, issued a final rule establishing that, as of

[12] Many producers have contracts that fix the price of their gas far into the future, often providing alternative prices depending on the regulatory classification of the gas and leaving it up to government action (statute, regulation, order) to determine the classification of the gas. The price fixed for regulated gas is commonly at or near the maximum lawful price. By contrast, the price for gas treated as not subject to a price ceiling is typically based on market prices. See D. Zillman & L. Lattman, *Energy Law* 533 (1983) (contract provisions "often allow prices to increase to match the highest price paid for gas in the area or to return the highest price allowed by government regulation"). As a result, when deregulated prices are below the statutory ceilings, many producers wish to have their gas treated as falling within one of the still-regulated categories, so that they can collect a higher contract price.

[13] The Commission did not address itself to all gas that could conceivably be qualified for sale in a particular category by the relevant state or federal jurisdictional agency. Rather, of gas that requires agency qualification for sale in a particular category, the Commission addressed only gas that actually is qualified in multiple categories by the relevant agency. The Commission also considered certain deregulated gas that need not receive an agency qualification. See 18 C.F.R. 270.208, referring to 18 C.F.R. 272.103(a), which defines deregulated gas to include only gas actually qualified as such by the relevant jurisdictional agency and certain "old" intrastate gas, which does not require agency qualification.

January 1, 1985, gas that is qualified for a category not subject to any price ceiling would be treated as deregulated and could be sold at any price the market would bear, even if the gas is also qualified for one of the categories still subject to statutory price ceilings. *Id.* at 73a-82a; see page 2, *supra* (quoting rule, 18 C.F.R. 270.208). Noting that market prices were then below statutory ceiling prices, that "Congress may not have anticipated such a situation" (Pet. App. 75a), and that many producers would therefore prefer to remain subject to price regulation, the Commission construed the NGPA to mandate deregulation.[14]

The Commission based this conclusion, first, on Section 121 of the NGPA, 15 U.S.C. 3331, which by its terms mandates the removal of Subtitle A's price ceilings for the specified categories of natural gas. The Commission read the provision to embody Congress's mandate to "phase from regulated ceiling prices in the short term to market clearing prices in the long term" (Pet. App. 76a). See *id.* at 75a-77a. The Commission pointed out (*id.* at 74a; see also *id.* at 43a) that "the overall scheme envisioned by Congress when it enacted the NGPA [was] to provide incentive prices to encourage exploration and development of new reserves in the short-term, and to gradually substitute market forces for regulated prices by phasing in deregulation in 1985 and 1987."

The Commission likewise construed Section 101(b)(5), 15 U.S.C. 3311(b)(5), to require deregulated treatment of gas that falls under both a provision setting a ceiling price and one eliminating any legal ceiling price (Pet. App. 78a-79a).[15] The Commission concluded that Section

[14] The Commission noted that, in 1979 and 1980, when market conditions were different, several producers, including some of respondents, argued in favor of the conclusion adopted by the Commission here. Pet. App. 74a & n.10.

[15] The Commission stated that the provision was "helpful, but not dispositive" of the issue (Pet. App. 78a).

101(b)(5), in declaring applicable whichever of the competing provisions "could result in the highest price," means that "the deregulated price, which always *could* result in a price *higher* than a regulated price, prevails" because "there always exists at least the potential for the parties to negotiate a contract above the old regulated ceiling price" (Pet. App. 78a-79a (emphasis in original)). The Commission further explained on rehearing (*id.* at 111a (footnote omitted; emphasis in original)): "Without question, a deregulated price *could* always result in a price higher than a regulated price which is subject to a ceiling price; whether the *contract* allows the producer to collect a price higher than regulated price is a contractual issue, not an issue raised by the deregulation scheme of the NGPA."

In addition to, and in the course of explaining, its ruling on the treatment of dual-qualified regulated-deregulated gas, the Commission specifically addressed itself to the proper treatment of certain so-called "new tight formation" gas eligible for special high-cost-gas pricing under Section 107(c)(5), 15 U.S.C. 3317(c)(5). Except for gas from certain old Outer Continental Shelf leases (see § 102(d), 15 U.S.C. 3312(d)),[16] "new tight formation" gas, under the Commission's defining regulation (18 C.F.R. 271.703(b)), "is new natural gas, (as defined in section 102(c)), * * * or gas produced through a new onshore production well (as defined in section 103(c))." Moreover, as the Commission pointed out (Pet. App. 81a-82a), "to qualify as new tight-formation gas under section 107(c)(5), a producer must file the same information, in addition to other information, that would be filed to qualify as a section 102 or 103 determination" (see 18 C.F.R. 274.205(e)(1)(i)(A) and (B)). Because a determination that a particular quantity of gas qualifies as new tight formation gas under Section 107(c)(5) therefore necessarily includes a determination that it meets the requirements of

[16] The Commission did not address such gas in this proceeding.

Section 102 or 103, the Commission ruled that a state or federal jurisdictional agency's qualification of gas as new tight formation gas is automatically a qualification under Section 102 or 103, even if the state or federal jurisdictional agency does not expressly style its ruling as such. See Pet. App. 81a-82a, 114a-116a. Under Section 121(a), 15 U.S.C. 3331(a), therefore, such gas was deregulated on January 1, 1985. Pet. App. 82a, 116a.

C. *The Court of Appeals' Decision*

On petitions for review filed by numerous producers under Section 506 of the NGPA, 15 U.S.C. 3416, the court of appeals rejected the Commission's interpretation of Sections 101(b)(5) and 121, 15 U.S.C. 3311(b)(5), 3331. Pet. App. 1a-24a. The court first concluded that Section 121 is ambiguous, because, although it commands the elimination of price ceilings for the listed categories of natural gas, it does not explicitly address the subject of deregulated gas that also qualifies for a regulated category (Pet. App. 10a-11a). The court then stated that, despite the ambiguity, it could not defer to the Commission's interpretation, as it ordinarily would, because "Congress anticipated precisely this question in § 101(b)(5)" (Pet. App. 11a), and the Commission's ruling was contrary to the "unambiguous language" of that provision (*id.* at 13a).

After concluding that Section 101(b)(5) applies to all dual-qualified gas, even if one of the overlapping categories is deregulated,[17] the court held that Section

[17] The court reasoned that Section 101(b)(5), in using the word "exemption" when referring to provisions "providing for any maximum lawful price or for any exemption from such a price," applies to statutory provisions declaring gas prices deregulated. The court rejected the suggestion that the term "exemption" applies only to the provisions (§§ 104(b)(2), 106(c), 109(b)(2), 15 U.S.C. 3314(b)(2), 3316(c), 3319(b)(2)) that grant the Commission authority to set special "just and reasonable" ceilings higher than statutory ceilings for par-

101(b)(5) expressly and unambiguously gives producers the right to choose, at any particular moment, whatever category, regulated or deregulated, provides the highest price under their contracts. Pet. App. 16a-17a; *id.* at 30a (modification on petitions for rehearing). The court rejected the Commission's construction of the "could result" language of Section 101(b)(5), reasoning that, while "the price of deregulated natural gas in an open market 'could' theoretically reach infinity" (*id.* at 15a), at least certain price ceilings for regulated gas similarly "could" rise without limit.[18] It stated that the Commission's reading of Section 101(b)(5) "considers only the theoretical possibilities [and] renders § 101(b)(5) meaningless" (Pet. App. 16a). The court concluded that Section 101(b)(5) "requires a comparison of the applicable price for each category at a particular moment" based on producers' actual contracts, rather than a comparison of ceiling prices, if any, under the applicable provisions (Pet. App. 16a). Under Section 101(b)(5), then, the highest price governs (Pet. App. 16a-17a).

In support of that conclusion, the court indicated that it read the NGPA, informed by several congressional floor statements, as granting a producer the right to "select the category or categories for which he or she desires to qualify particular gas" (Pet. App. 19a). See *id.* at 18a-19a (citing 124 Cong. Rec. 29109 (1978) (Sen. Jackson); *id.* at

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ticular categories. The court pointed out that another of the "[r]ules of general application" – namely, Section 101(b)(9), 15 U.S.C. 3311(b)(9) – uses "exempted" and "exemption" to refer to provisions that deregulate gas prices (Pet. App. 14a-15a).

[18] Observing that the Commission could set price ceilings at "just and reasonable" rates under certain regulated-price provisions (§§ 104(b)(2), 106(c), 109(b)(2), 15 U.S.C. 3314(b)(2), 3316(c), 3319(b)(2)) and that the Subtitle A ceiling prices generally rise with inflation, the court reasoned: "The price of regulated gas is therefore certain to rise, and is capable of reaching an indefinite 'just and reasonable' rate." Pet. App. 15a-16a.

38363-38364 (Rep. Dingell)). This principle of producer choice of what categories to qualify gas in, the court reasoned, is inconsistent with the Commission's conclusion that a producer cannot choose a regulated category for gas that is already qualified for a deregulated category. The court also cited this principle as the basis for rejecting the Commission's ruling that most "new tight formation" gas under Section 107(c)(5), 15 U.S.C. 3317(c)(5), is automatically qualified under Section 102(c) or 103, 15 U.S.C. 3312(c), 3313, and hence deregulated. Pet. App. 18a-19a. Even if such gas in fact meets the requirements of Section 102(c) or 103, the court ruled, producers are entitled to "a choice as to which category or categories for which they seek to qualify particular gas" (Pet. App. 18a).[19]

The court rejected the Commission's reliance on phased deregulation as the overall plan of the NGPA. Phased deregulation is not the sole means chosen by Congress to achieve the ultimate statutory aim of ensuring adequate supplies at fair prices, the court stated (Pet. App. 20a). The court briefly mentioned a few statements from the NGPA's legislative history (*id.* at 21a-22a n.15), but it

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[19] The court indicated its belief (Pet. App. 18a & n.12) that so-called "recompletion tight formation" gas is an exception to the rule that "new tight formation" gas always in fact meets the requirements under Section 102 or 103, 15 U.S.C. 3312, 3313. In fact, contrary to that suggestion (and to the same suggestion in our petition (at 10 n.15, 12 n.18)), "recompletion tight formation" gas (18 C.F.R. 271.703(b)(3)) is not included within the definition of "new tight formation" gas (18 C.F.R. 271.703(b)(2)), so it does not present the suggested exception.

It is not clear whether the court of appeals understood the new tight formation gas issue as separate and distinct from the general dual-qualification issue. On considering petitions for rehearing, the court clarified (Pet. App. 30a) that its decision "does not interfere with FERC's continuing authority to modify the criteria that establish which types of gas qualify under § 107(c)(5)."

noted that the cited passages had "somewhat contradictory" implications (*ibid.*). The court also recognized that "Congress did not expect that natural gas prices would fall" and hence did not anticipate the situation presented to the Commission in 1984 and today—that of producers wishing to remain under regulation (*id.* at 22a-23a). The court of appeals further recognized that, under its view, Section 101(b)(5) "can have the unanticipated effect of operating as a price floor for producers" (Pet. App. 23a). Nevertheless, the court felt itself bound by "the intent of Congress as evidenced in the unambiguous language [of the NGPA]" (*id.* at 24a).

SUMMARY OF ARGUMENT

I. The court of appeals' reading of Section 101(b)(5) of the NGPA is inconsistent with the language, policies, and history of the NGPA. The Commission's reading of Section 101(b)(5) is correct and is entitled to deference.

A. Section 101(b)(5) declares that when a particular quantity of gas falls under two applicable NGPA pricing provisions, "the provision which could result in the highest price" shall apply. Read naturally, those words call for a simple comparison between the highest price permitted by one provision and the highest price permitted by the other: the higher the applicable ceiling, the higher the price that "could result" under the provision. All producers whose gas falls under both provisions are governed by the same higher-ceiling provision. When one of the applicable provisions sets no legal ceiling (*i.e.*, deregulates the price of the gas), that provision applies because it permits producers to contract to sell their gas unconstrained by any price ceilings.

Contrary to the court of appeals' reading, Section 101(b)(5) does not call for a comparison of the prices that happen to be specified in particular producers' contracts. The section makes no reference to contract prices; it deter-

mines which statutory "provision" applies in the case of overlap, based on the prices that "could result," not on the prices that in fact result. Moreover, nothing in Section 101(b)(5) suggests that it contemplates, as the court of appeals' reading does, that two producers with gas falling under the same two provisions could be subject to different NGPA pricing provisions, depending on their particular contract prices.

Reading Section 101(b)(5) as focusing on contract prices would be inconsistent with the approach to price regulation taken by the NGPA as a whole. The NGPA sets only ceiling prices and otherwise leaves the establishment of actual sale prices to private decision. Section 101(b)(5) should not be read, as the court of appeals read it, as an anomalous provision that is concerned with the private contract prices at which particular gas is sold, rather than merely determining what upper limit, if any, constrains the contract price.

B. The error of the court of appeals' reading of Section 101(b)(5) is especially stark as it applies to gas that is qualified in both regulated and deregulated categories. The court's ruling, by allowing producers to choose regulated treatment for gas that otherwise would be deregulated and sold at a lower price, substitutes a permanent producer-assistance policy for the policy of phased deregulation leading to market control of prices that Congress adopted in the NGPA.

In addition, the legislative history of the NGPA demonstrates unmistakably that Congress as a whole, and in fact every participant in the legislative process, would have rejected the suggestion that producers could receive higher prices than deregulation would afford them. Deregulation was the most favorable position toward producers that was even discussed. The result reached by the court of appeals thus lies outside the terms of the debate leading up to the NGPA's enactment.

II. The court of appeals also erred in rejecting the Commission's ruling that most "new tight formation" gas is automatically qualified as deregulated gas under Section 102(c) or 103, 15 U.S.C. 3312(c), 3313. The Commission has broad regulatory authority under the NGPA and, in particular, is empowered to define the categories of "high-cost" gas deserving of special pricing under Section 107(c)(5), 15 U.S.C. 3317(c)(5). The Commission's ruling on new tight formation gas is a reasonable means of enforcing the plain terms of its definition of such gas, which states that new tight formation gas "is" gas as defined in Section 102(c) or 103. Moreover, the Commission's ruling is the legal equivalent of a change in the definition of new tight formation gas so as to exclude gas qualifying under Section 102(c) or 103. Such a change of definition would serve the purpose of ensuring, consistent with the legislative history of the statute, that producers do not receive more favorable treatment than deregulation would afford them. The Commission's means of achieving precisely the same result should therefore be upheld.

ARGUMENT

I. THE COMMISSION CORRECTLY CONCLUDED THAT SECTION 101(b)(5) OF THE NGPA REQUIRES THE DEREGULATION OF NATURAL GAS THAT IS QUALIFIED FOR BOTH REGULATED AND DEREGULATED TREATMENT

The court of appeals held that Section 101(b)(5) of the NGPA permits a natural gas producer whose gas is qualified in more than one NGPA category to compare the prices its contracts allow it to charge at a given time for gas in each category and select the highest price. The court therefore rejected the conclusion of the Commission, the agency charged with administering the NGPA, that Section 101(b)(5) places such gas in whichever of the categories imposes the highest legal ceiling, without regard to individual producer contracts—so that, when one ap-

plicable category places no upper limit on the price a producer may charge, that category applies, and the gas is deregulated.[20] The court of appeals' rejection of the Commission's position is erroneous. It is contrary to the language of Section 101(b)(5), to the NGPA's general approach to regulation (which focuses on ceiling prices only, and not on producers' contract prices), to the statute's overall plan of phased deregulation, and to the legislative history, which precludes any reading of the NGPA, such as the court of appeals' reading, that would allow producers to charge higher-than-market prices.

A. When Gas Is Qualified Under Two NGPA Pricing Provisions, Section 101(b)(5) Determines Which Provision Is Applicable Based On A Comparison Of The Ceiling Prices, If Any, Set Under Those Provisions, Not A Comparison Of Particular Producers' Contract Prices

To begin, as one must, with the language of the statute (*e.g.*, *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)), Section 101(b)(5) states that, when several NGPA provisions apply to a particular quantity of gas, "the provision which could result in the highest price shall be applicable." Although this may not be "a provision in which Congress' limpid prose puts an end to all dispute," that does not mean "that all interpretations are equally plausible" (*Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, No. 86-473 (Dec. 1, 1987), slip op. 6). Rather, like the provision at issue in *Gwaltney of Smithfield, Ltd.*, Section 101(b)(5) has a single "most natural reading."

That reading, as the Commission concluded, calls for a comparison of the maximum prices allowed by the several

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[20] We do not renew the argument we made in the court of appeals that Section 101(b)(5) does not apply to dual-qualified regulated-deregulated gas. We note, however, that it is by no means clear that Congress specifically contemplated that the provision would apply to such gas.

provisions applicable to a given quantity of natural gas. If natural gas is subject to two or more provisions of the NGPA, the "provision which could result in the highest price" is the provision that, solely with reference to the limits imposed under the NGPA, permits the highest price. See also H.R. Conf. Rep. 95-1752, *supra*, at 74 ("the provisions that permit the seller to obtain the highest price"). In the case of gas falling under two provisions that set ceiling prices, the one with the higher ceiling applies—and does so for all producers whose gas falls under those two provisions. Where one of several applicable provisions sets a ceiling price and another declares that there is no such ceiling, the deregulating provision is the one that "could result" in the highest price.

The court of appeals rejected the Commission's view that Section 101(b)(5) calls for the comparison only of ceiling prices; the court did not dispute that, if that reading is correct, it requires that gas qualified in both a regulated and deregulated category be deregulated. In the court of appeals' view, Section 101(b)(5) in every case calls for a comparison, not of applicable statutory ceilings, but of the prices particular producers have included in their contracts.[21] That is so even for gas that falls under two provisions that set ceiling prices: in that case, under the court's reading, Section 101(b)(5) requires the comparison of particular producers' contract prices, not of the ceiling prices under the applicable provisions, and so Section 101(b)(5) could require the application of different provisions for different producers, depending on what prices each happens to have included in its contracts. This view is inconsistent with the language of Section 101(b)(5) and with the approach to price regulation taken by Title I of the NGPA

[21] See, *e.g.*, Pet. App. 16a-17a n.11 (emphasis added) ("the *contractual* price for regulated gas in the regulated category is to be compared with the *contractual* price for deregulated gas in the deregulated category").

as a whole, and the Commission's view that Section 101(b)(5) focuses exclusively on ceiling prices is clearly the better reading.

1. There are in the language of Section 101(b)(5) itself several decisive pieces of evidence supporting the Commission's reading. First, Section 101(b)(5) expressly calls for a comparison, simply, of NGPA "provisions." The statute contains no hint that the called-for comparison requires any reference to "contracts" or any other fact outside the terms of the price-setting provisions. Nor does it contain any reference to particular "producers" or any other hint that, as the court of appeals would allow, the overlap of the same two provisions could be resolved differently for different producers. Rather, it requires the comparison of the highest prices legally permitted under each applicable provision, not the prices particular producers happened to have included in their contracts.

Contrary to the court of appeals' reading, the result of the Section 101(b)(5) comparison is not to determine the price a producer must charge. What is determined is simply "the provision" that "shall be applicable" (Section 101(b)(5)). As was explained in the "comprehensive explanatory statement" prepared by five House conferees (Reps. Staggers, Ashley, Eckhardt, Wilson, and Dingell) in urging the House to adopt the conference bill (124 Cong. Rec. 38363 (1978) (emphasis added)), "if more than one ceiling price rule appears applicable," "[w]hichever ceiling price could result in the highest price is the *applicable maximum* lawful price." Section 101(b)(5) determines only the applicable ceiling price, and it does so for all producers whose gas happens to fall under the same two provisions.

Congress's use of the statutory phrase "could result" confirms the irrelevance of producers' contract prices to the comparison called for by Section 101(b)(5). Especially in a statutory provision that does not refer to producers or

contracts, that phrase can only call for an inquiry into the range of prices that a particular provision of the NGPA permits producers to charge. The producer respondents, in their effort to support the court of appeals' interpretation, have had to rewrite the statute: they read it as making applicable the provision that "results" (Br. in Opp. 14), "actually results" (*id.* at 11), or "will result" (*id.* at 8, 16) in the highest price. But the statute requires application of the provision that "could result" in the highest price. If Congress had wished to require a comparison of contract prices, "Congress could have phrased its requirement in language" like that suggested by the producer respondents, but "it did not choose this readily available option" (*Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, slip op. 6). Accordingly, Section 101(b)(5) must be read as referring to the range of legally permitted possibilities, not as determining which of several contract prices a producer must actually charge.

2. The court of appeals mistakenly concluded that the Commission's interpretation of the phrase "provision which could result" somehow rendered Section 101(b)(5) "meaningless" (Pet. App. 15a-16a). The categories of natural gas defined in Subtitle A of the NGPA overlap one another, and a rule is therefore required to determine where to place gas that is qualified in more than one category. Section 101(b)(5) furnishes the needed rule in a single sentence, encompassing all cases of dual-qualified gas—gas that falls into two regulated categories (regulated-regulated gas) and gas that falls simultaneously into regulated and deregulated categories (regulated-deregulated gas). The Commission's interpretation of Section 101(b)(5), far from rendering the provision meaningless, construes it as precisely specifying which category applies in every case—for regulated-regulated gas, the category with the higher ceiling; for regulated-deregulated gas, the deregulated category. Although the result of the

required comparison is always the same for regulated-deregulated gas, that is obviously not so for the regulated-regulated case. Section 101(b)(5) thus fulfills a necessary role in the NGPA under the Commission's reading.

Contrary to what the court of appeals thought, the Commission in no way reads Section 101(b)(5) as referring only to "theoretical possibilities" (Pet. App. 16a). Section 101(b)(5) does not require a comparison of what prices a producer might "theoretically" be able to charge depending on market conditions, the statutory inflation adjustments over time, or whether the Commission exercises its power to set special "just and reasonable" rates (Pet. App. 15a-16a). Section 101(b)(5) is not concerned with any such hypothetical situations either at a particular moment or over an indefinite period. It is concerned only with what the NGPA permits at a particular moment. Under Section 101(b)(5), as the Commission reads it, if two provisions apply to a given quantity of gas, the one that leaves producers free to contract to sell their gas at the higher price governs.

3. The court of appeals' view is inconsistent not only with the language of Section 101(b)(5) but with the approach to price regulation taken by Title I of the NGPA as a whole. See, *e.g.*, *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 18-19 (1981) (citation omitted) (particular provision should be construed in light of " 'the provisions of the whole law' "). Under the court of appeals' view, Section 101(b)(5) requires a comparison of the prices producers happened to include in their contracts, not simply of the ceilings applicable under the NGPA. But such a construction would be anomalous in a statute that otherwise deals only with the upper limit on any producer price.

As the Commission's view recognizes, the pricing provisions of Title I of the NGPA regulate only the maximum prices producers may charge and do not concern

themselves with producers' contract prices, as long as they do not exceed applicable legal ceilings. Thus, the price-regulation provisions of Subtitle A do not establish the prices that producers must charge; rather, in every provision, the statute is concerned solely with setting "maximum lawful prices" or "ceiling prices." Section 504(a), 15 U.S.C. 3414(a), reinforces what those statutory terms already make clear – that such prices are only upper limits, below which parties are free to set their prices: Section 504(a)(1) declares it unlawful "to sell natural gas at a first sale price in excess of any applicable maximum lawful price." The NGPA again underscores its exclusive concern with upper limits in Section 101(b)(9), 15 U.S.C. 3311(b)(9), which expressly declares that contract prices are enforceable as long as they are lower than any applicable statutory ceiling, and are always lawful if a price-deregulation provision applies.

Congress clearly sought to set only maximum prices and otherwise to leave the establishment of the prices producers would actually charge to private decision.[22] Indeed, in explaining Section 101(b)(9), the Conference Report states (H.R. Conf. Rep. 95-1752, *supra*, at 74): "The rule

[22] Congress's removal of ever-increasing amounts of natural gas from the reach of the Natural Gas Act (see NGPA § 601, 15 U.S.C. 3431) confirms this. For gas covered by the Natural Gas Act (NGA), producers must file their contract rates with the Commission and are forbidden to alter contract rates without complying with certain filing and waiting-period requirements; moreover, if the Commission finds a proposed rate unjust or unreasonable, the Commission fixes the actual rate. See NGA §§ 4, 5, 15 U.S.C. 717c, 717d; *FPC* v. *Texaco, Inc.*, 417 U.S. 380 (1974); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956). The NGPA rejected these restrictions on producers' right to alter contracts and, with respect to the increasing quantities of gas removed from NGA jurisdiction, specified that, as far as the NGPA was concerned and subject to their contractual commitments, producers may freely change the price at which they sell gas as long as they do not exceed NGPA ceilings.

for application of ceiling prices pertains to maximum lawful prices. All maximum lawful prices are ceiling prices only." The explanatory statement prepared by the House conferees urging adoption of the conference bill likewise emphasized that the NGPA would not establish contract prices as such, but only restrict how high they could go: "The rule set forth in section 101(b)(9) is that the legislation establishes *ceiling* prices" (124 Cong. Rec. 38364 (1978) (emphasis in original)).[23] The court of appeals' reading of Section 101(b)(5) as dealing with the actual prices producers' contracts permit them to charge would render it a glaring anomaly in a statute otherwise pervasively concerned only with ceiling prices.

[23] In Section 105, 15 U.S.C. 3315, which applies to gas sold under intrastate contracts pre-dating the NGPA (or their successors), the statutory limit happens to depend on the contract terms. By its terms, however, the provision only sets a "maximum lawful price." Moreover, the provision, addressed to the distinctive transition problems of previously unregulated intrastate contracts' being brought under federal regulation, is clearly exceptional in the context of the NGPA. In any event, the key House conferees, recognizing that the coincidence of ceiling and contract prices is exceptional, stressed that the statute did not purport to address contract prices as such and that any interference with contracts was to be minimized: "The FERC is intended to play an enforcement role with respect to the ceiling prices, not with respect to enforcement of private contracts per se. * * * Of course, in some cases, for example under section 105, the statutory ceiling prices and contract prices will coincide. In those cases FERC's enforcement responsibilities under this legislation may require an inquiry regarding the meaning of contractual provisions. This inquiry is essential if FERC is to enforce the ceiling price where that price is based upon a contract between private parties. Nevertheless, it is contemplated that FERC's implementation of the bill will be accomplished with minimal interference with contractual relationships." 124 Cong. Rec. 38364 (1978).

B. The Overall Scheme And History Of The NGPA Preclude Permitting Producers To Select Regulated Treatment At A Higher Price For Gas That Is Qualified For Deregulated Treatment At A Lower Price

The error of the court of appeals' reading of Section 101(b)(5) is made especially clear by the results it produces when applied to gas that is qualified for both regulated and deregulated treatment. Under the court's reading, a producer could repeatedly switch back and forth between regulated and deregulated categories, perhaps daily, as the contract prices in those categories change with time and market conditions. A producer not only could return deregulated gas to regulated status but also could obtain a price higher than the deregulated (market) price. Such results would be contrary to the overall scheme Congress enacted in the NGPA and would afford producers more favorable treatment than anyone in Congress urged or contemplated, so much so as to be wholly outside the terms of the debate that led to the NGPA's enactment.

1. The clear overall scheme of the NGPA is one of "[p]hased deregulation" (124 Cong. Rec. 38361 (1978) (Rep. Dingell); *id.* at 29659 (Sen. Percy) ("the phased deregulation schedule * * * really is at the heart of this bill")). As shown by Section 601, 15 U.S.C. 3431, with its removal of increasing amounts of gas from the Commission's jurisdiction under the Natural Gas Act, and by Section 121, 15 U.S.C. 3331, with its three-stage plan for the elimination of price ceilings, the Act contemplates a transition to deregulation for an ever-increasing portion of the natural gas sold in this country (as "old" gas is replaced by "new" gas). The intended transition is reflected as well in Section 122, 15 U.S.C. 3332, which establishes only one method to call off deregulation (action by the President or Congress), and then only temporarily and only once. As the Conference Report states, Title I of the NGPA provides for the eventual "deregulation of most categories of natural gas" (H.R. Conf. Rep. 95-1752, *supra*, at 68). See also 124 Cong. Rec. 28634 (1978) (Sen. Jackson) ("It is a phased deregulation bill which, in 1985, if it does not work, the Congress and the President retain the opportunity to continue price regulations for 18 months, if necessary."); *id.* at 28642 (Sen. Melcher) (bill "will work up gradually to a point of deregulation"), 28645 (Sen. Pearson) (bill "provides the process which will lead us ultimately to the deregulation of new natural gas pricing"), 28884 (Sen. Hart) (bill "eventually deregulates the price of natural gas"), 28886 (Sen. Hansen) (bill "says we will have deregulation 7 years away").

The court of appeals' reading of Section 101(b)(5) is inconsistent with this basic plan for the future of natural gas regulation. The court of appeals would permit a producer to return deregulated gas to regulated status. It would also permit producers to switch back and forth between deregulated and regulated status, with no apparent limitation, as market prices rise or fall.[24] Nothing in the NGPA itself or in the legislative history of the Act contemplates either the peculiar system of (perhaps daily) category changes or the return to regulation of gas that has once been released from price regulation. To the contrary, such results would interfere with the gradual substitution of market controls for regulatory controls that Congress envisioned.

Under the court of appeals' reading, the future of natural gas regulation would follow a policy quite different from the deregulation policy established by Congress. The court of appeals' decision establishes a uniform and permanent producer-assistance policy, always affording producers the highest possible price, even when

[24] The potential for return of deregulated gas to regulated status is a continuing one, because some deregulated "new" gas (under §§ 102 and 103, 15 U.S.C. 3312, 3313) will always become regulated "stripper well" gas (under § 108, 15 U.S.C. 3318) as the well diminishes in production.

market forces set a lower price. But while the (mostly) temporary incentive-price provisions of the NGPA certainly were intended to spur production, the deregulation policy that has now been phased-in for most categories of gas — like any system for allowing market forces to determine price — is not intended single-mindedly to favor producers or production.

The NGPA deregulation policy resulted from Congress's belief, as this Court recognized in *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. at 424 (footnote omitted), that "direct federal price control exacerbated supply and demand problems by preventing the market from making long-term adjustments." To the extent that Congress deregulated "particular aspects of the first sale of gas, it did so because [after the specified phase-in periods] it wanted to leave determination of supply and first-sale price to the market" (*id.* at 422). Allowing "long-term adjustments" in supply and demand to be made by the operation of market forces is not a policy that, in intent or effect, uniformly favors producers or increases production.

A market policy always carries the possibility, as one of its natural consequences, that prices and production may decrease at particular times — for example, as the costs diminish for alternative fuels such as oil and coal. Indeed, proponents of deregulation in Congress made just this point in arguing, in response to their opponents' principal contention, that deregulation would not result in excessively high prices or revenues for producers. See, *e.g.*, 123 Cong. Rec. 26455 (1977) (Rep. Stockman); *id.* at 29783 (Sen. Hansen), 29784 (Sen. Bartlett), 29931 (Sen. Johnston), 31252 (Sen. Stevens); 124 Cong. Rec. 28877 (1978) (Sen. Weicker) ("the price under total deregulation in a free market, can go down if the supply is too great"); *id.* at 28882 (Sen. Bumpers), 29103 (Sen. Bellmon).[25]

[25] Senator Stevens explained (123 Cong. Rec. 31252 (1977)): "The argument for deregulation is straightforward and simple. Market prices for natural gas should prevail for the same reason the market sets most prices in our society. Producers have an incentive to find the lowest cost supplies and sell to all consumers who find the product at the market price more valuable than their alternatives. * * * If demand slackens, producers will drop their higher cost production, and restrain prices, until balance is again achieved.

"We argue that the same thing will happen with natural gas. With deregulation, prices may well rise above the controlled levels. More supplies will be produced. Consumers who have lower cost alternatives will switch, thus freeing additional supplies, and helping to moderate the price rise."

This obvious aspect of the working of a policy of deregulation, as applied in circumstances like those prevailing in the market today, is simply incompatible with the producer-assistance policy adopted by the court of appeals.

2. The producer-assistance policy that results from the court of appeals' view of Section 101(b)(5) is not merely incompatible with the plan of phased deregulation that Congress adopted. By allowing producers to receive higher prices than market forces would establish, the court of appeals has read the NGPA as affording producers more favorable treatment than any participant in the debate leading up to the enactment of the NGPA supported. It is inconceivable that the Congress that enacted the NGPA would have passed a statute that enabled producers to receive higher than market prices.

As we demonstrated above (pages 4-7, *supra*), the natural gas pricing scheme adopted by Congress was a compromise between "two strong, but divergent, responses to the natural gas shortage" (*Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 331), with one predominating by a slim margin in the Senate, the other by a slim margin in the House. See also H.R. Conf. Rep. 95-1752, *supra*, at 68 ("compromise"); 124 Cong. Rec. 38361 (1978) (Rep. Dingell) ("compromise"); *id.* at

29404 (Sen. Byrd) ("compromise").[26] In both the 94th and 95th Congresses, the debate over natural gas legislation took place along a spectrum – at one end were those supporting some form of deregulation; at the other were those supporting the extension into intrastate markets of some form of federal price ceilings. See H.R. Rep. 95-543, *supra*, at 391-392; 124 Cong. Rec. 28634-28635 (1978) (Sen. Jackson); 123 Cong. Rec. 30741-30742 (1977) (Congressional Research Service memorandum). The first group, which predominated in the Senate and was led by Senators from the gas-producing states, reflected a range of views about when and what kinds of gas should be deregulated. See, *e.g.*, 121 Cong. Rec. 30735-30737 (1975) (Sens. Bartlett and Long); *id.* at 30739 (Sen. Taft), 30908 (Sen. Bentsen), 30914 (Sen. Tunney), 31250 (Sens. Packwood and Scott); 123 Cong. Rec. 25897 (1977) (Rep. Anderson); *id.* at 25936 (Rep. Hightower), 25938-25940 (Rep. Kemp), 29781 (Sen. Hansen), 29927 (Sen. Bartlett), 29784-29786 (Sen. Pearson), 30186-30187 (Sen. Bentsen); 124 Cong. Rec. 28635 (1978) (Sen. Bartlett); *id.* at 28881 (Sen. Weicker). The second group, which predominated in the House, reflected a range of views about what changes, if any, should be made in the level of federal price ceilings. See, *e.g.*, 121 Cong. Rec. 30902-30903 (1975) (Sen. Hollings); 122 Cong. Rec. 2387-2388 (1976) (Rep. Smith);

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[26] The Conference Committee adopted elements of both the Senate and House bills, bringing intrastate gas under control (as the House but not the Senate proposed), phasing in deregulation of "most categories of natural gas" (H.R. Conf. Rep. 95-1752, *supra*, at 68) (as the Senate but not the House proposed), but lengthening the periods proposed by the Senate for the phasing in of deregulation. On the compromise nature of the bill, see Allison, *Natural Gas Pricing: The Eternal Debate*, 37 Baylor L. Rev. 1, 37 (1985); Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 Va. L. Rev. 63, 89 (1982); Moody & Garten, *The Natural Gas Policy Act of 1978: Analysis and Overview*, 25 Rocky Mtn. Min. L. Inst. 2-39, 40 (1979).

H.R. Rep. 95-543, *supra*, at 391-397; 123 Cong. Rec. 25894 (1977) (Rep. Ashley); *id.* at 25898 (Rep. Dingell); S. Rep. 95-436, *supra*, at 2-5, 15-16, 42-43 (Sen. Abourezk), 45-46 (Sen. Bumpers), 47-49 (Sen. Metzenbaum); 123 Cong. Rec. 29925-29926 (1977) (Sen. Metzenbaum); 124 Cong. Rec. 28637 (1978) (Sen. Metzenbaum); *id.* at 28648 (Sen. Proxmire).

No one among those supporting deregulation, however, even remotely suggested that producers should receive higher than market prices. Indeed, such a suggestion would have been contrary to their key argument that the market was the right mechanism to determine prices and to induce sufficient production. See, *e.g.*, 121 Cong. Rec. 30735-30737 (1975) (Sens. Bartlett and Long); *id.* at 30908 (Sen. Bentsen), 31223 (Sen. Fannin), 31250 (Sen. Packwood), 31358-31359 (Sen. Stevens), 31988-31992 (Sen. Gravel); 123 Cong. Rec. 25923 (1977) (Rep. Edwards); *id.* at 25926 (Rep. Krueger), 25932 (Rep. Ichord), 26458 (Rep. Symms), 26460 (Rep. Archer), 26467 (Rep. Watkins), 29781-29782 (Sen. Hansen), 30373 (Sen. Pearson), 30388-30390 (Sen. Percy), 31252 (Sen. Stevens), 31774-31775 (Sen. Goldwater). Those on the other side of the debate would have found such a suggestion even more objectionable. They opposed deregulation, and sought to impose price ceilings, because they believed that deregulation itself would be too favorable to producers – would create "windfall profits" and raise prices excessively. See, *e.g.*, 121 Cong. Rec. 31215-31218 (1975) (Sen. Hollings); *id.* at 31803 (Sen. Stevenson); H.R. Rep. 95-543, *supra*, at 391; 123 Cong. Rec. 25894 (1977) (Rep. Ashley); *id.* at 25916 (Rep. Ottinger), 26453 (Rep. Ashley), 29780 (Sen. Jackson); S. Rep. 95-436, *supra*, at 20, 39 (Sen. Jackson), 45-46 (Sen. Bumpers), 47-49 (Sen. Metzenbaum). The proponents of deregulation took pains to respond to that critical objection by arguing that deregulation would, while raising prices, not do so excessively and, indeed,

would eventually moderate prices by imposing market discipline on gas producers. See sources cited page 30, *supra*; see also 121 Cong. Rec. 30930 (1975) (Sen. Fannin); 123 Cong. Rec. 26453 (1977) (Rep. Brown); *id.* at 26457 (Rep. Ketchum), 29783 (Sen. Hansen), 29784 (Sen. Bartlett), 30188 (Sen. Bentsen), 30379 (Sen. Domenici), 31251 (Sen. Stevens), 31572 (Sen. Weicker). Finally, central to the arguments made by the supporters of the conference agreement were the beliefs that the agreement would not result in windfall profits and that the gradually increasing ceiling prices established by the bill would cushion the shock of the eventual jump up to still-higher deregulated prices. See, *e.g.*, 124 Cong. Rec. 28632 (1978) (Sen. Jackson); *id.* at 28642 (Sen. Melcher), 28883-28884 (Sen. Hart), 38361-38362 (Rep. Dingell).[27]

In these circumstances, it would have been unthinkable to suggest that producers should receive more than market forces would give them. Such higher-than-market prices would almost by definition have been deemed just the sort of windfall profits that no one in the debate suggested producers deserved. And the history of the NGPA makes crystal clear that all participants in the legislative process understood—as Senator Jackson, the Senate floor manager, said in explaining why the "very important" high-cost gas under Section 107(c)(1)-(4), 15 U.S.C. 3317(c)(1)-(4), was deregulated within one year—that deregulation provided "the maximum economic incentive" (124 Cong. Rec. 28633 (1978)) that anyone in Congress was considering. See also 124 Cong. Rec. 38361 (1978) (Rep. Dingell) ("The deregulation provisions provide the incentives required for producers.").

[27] Representative Dingell, the floor manager of the conference bill in the House, explained that, although he had opposed immediate deregulation for fear of its harsh consequences to consumers and potential for windfall profits, "[p]hased deregulation as set forth in the conference report avoids both of these objectionable results" (124 Cong. Rec. 38361 (1978)).

In short, deregulation was the most favorable position for producers even being discussed.[28] To permit producers higher than market prices, as would the court of appeals' ruling, would be to adopt a position that lies wholly outside the spectrum within which the debate in Congress took place. That reading of the Act is one that not only Congress as a whole but, in fact, both sides of the debate would have rejected.

3. The court of appeals erred in finding (Pet. App. 18a-22a) that its ruling was supported by a congressional commitment to the principle of producer choice. The court read the NGPA as granting producers an indefeasible right to choose, from among the available pricing categories, those in which they would seek qualification from the relevant state or federal jurisdictional agency. But that proposition, which we believe is incorrect[29] and is of only minor importance,[30] is irrelevant to the Commis-

[28] Several of the opponents of deregulation expressly identifed the deregulation side of the debate as representing the producers' interests. See, *e.g.*, 121 Cong. Rec. 31211 (1975) (Sen. Hollings) (producers sought deregulation in 1950 and 1956 and are now trying again); 123 Cong. Rec. 26482 (1977) (Speaker O'Neill).

[29] In our view, nothing in Section 503, 15 U.S.C. 3413, which provides for administrative determinations of the proper category of natural gas, grants producers the indefeasible right to select one of two applicable categories. The authority of the Commission to promulgate regulations under Sections 501(a) and (b) and 503(b), 15 U.S.C. 3411(a) and (b), 3413(b), should encompass the authority to direct that gas that in fact falls into a deregulated as well as a regulated category be treated as deregulated. Such an action would be consistent with the overall aims and the specific history of the NGPA, as discussed above, and would also serve the purpose of simplifying the administration of the Act, which was the subject of considerable congressional concern. See sources cited at pages 37-38, *infra*.

[30] If this Court reverses the Tenth Circuit's decision overturning the Commission's ruling that most new tight formation gas under Section 107(c)(5), 15 U.S.C. 3317(c)(5), is automatically qualified under Section 102 or 103, 15 U.S.C. 3312, 3313, it should be a rare case where

sion's dual-qualification ruling. The Commission's ruling applies only to gas that has already been dually qualified in both regulated and deregulated categories. Whether that ruling is correct presents a quite different question from whether producers have an unqualified right to decline in the first place to seek or accept jurisdictional-agency qualification in particular categories. However that question is answered, the NGPA embodies no principle of producer choice that permits a producer to place gas that is already qualified for deregulated treatment into a regulated category with a higher than market price.

The language of Section 101(b)(5) itself is contrary to the suggested principle, since that provision declares what price provisions govern; it does not give producers any choice in the matter. Moreover, and perhaps most important, such a principle would give producers a more favorable position – enabling them to opt in and out of the operation of the market – than anyone in the legislative process contemplated (see pages 31-35, *supra*). And allowing producers, indefinitely into the future, to choose regulated pricing rather than market prices would be inconsistent with the congressional policy of phased deregulation.

The court of appeals pointed (Pet. App. 19a, 21a-22a, n.15) to several statements in the legislative history to support its conclusion. In fact, the legislative history does not

gas that qualifies for regulated status has not also been qualified for a deregulated status for which it is eligible. Aside from Section 107(c)(5) gas, most of which the Commission's rule would automatically qualify for deregulated status, the only regulated gas that presents a significant potential problem of overlap with deregulated gas is stripper-well gas qualified under Section 108, 15 U.S.C. 3318. Almost all such gas that could be qualified under Section 102 or 103, however, will in fact have been so qualified before the well's production diminishes and the gas becomes eligible for Section 108 status.

provide the necessary support. First, as the court of appeals recognized (*id.* at 21a n.15), the statements in the legislative history that address the subject of gas that could qualify for two different kinds of treatment point in opposite directions. Several statements might suggest an intent that dual-qualified regulated-deregulated gas would be deregulated.[31] Further, the two statements centrally relied on by the court of appeals – the explanatory statement of the key House conferees led by Representative Dingell (Pet. App. 19a, quoting 124 Cong. Rec. 38363-38364 (1978)) and the statement of Senator Jackson (Pet. App. 19a, quoting 124 Cong. Rec. 29109 (1978)) – do not state that producers can opt out of a deregulated qualification they have already obtained. Rather, the statements are concerned with the wholly distinct issue (see pages 35-36, *supra*) of the awarding and seeking of qualifications in the first instance. Even on that issue, moreover, the statements are specifically addressed only to the repeatedly expressed concerns about the potential administrative burdens that the NGPA, because of its complexity, would place on the agencies that determine the classification of natural gas (124 Cong. Rec. 28651 (1978) (Sens. Proxmire and Abourezk); *id.* at 28875 (Sen. Weicker), 29386 (Sen. Reigle), 29665-29669 (Sen. Abourezk, and comments of FERC chairman), 30038 (Sen. Melcher, citing FERC staff analysis), 38352-38354

[31] Senator Bartlett stated (124 Cong. Rec. 31387 (1978)): "[I]n informal discussions on the floor it has been asserted that stripper wells are deregulated. This is true only to the extent that such wells are otherwise new wells and would be deregulated anyway." And the key House conferees, led by Representative Dingell, explained (124 Cong. Rec. 38364 (1978)) that obtaining two qualifications for new gas from a stripper well "would permit the producer to obtain stripper well pricing under section 108 prior to January 1, 1985, and deregulation as new gas thereafter." See Pet. App. 21a n.15.

(Rep. Anderson), 38355-38358 (FERC staff analysis)); and they merely affirm that it is up to producers to seek particular qualifications, so that the agencies have no statutory obligation to search through all possible classifications, demand all potentially relevant information from producers, and independently determine the proper category. Indeed, it is hard to imagine that Representative Dingell and Senator Jackson, both of whom came to the conference compromise from the side of the debate that opposed deregulation as too costly (123 Cong. Rec. 26454 (1977) (Rep. Dingell); 124 Cong. Rec. 38361 (1978) (Rep. Dingell); S. Rep. 95-436, *supra,* at 39 (Sen. Jackson); 123 Cong. Rec. 29780 (1977) (Sen. Jackson)), would have meant or been understood to suggest that producers could invoke the mechanisms of the NGPA to opt out of deregulation and to obtain higher than market prices.[32]

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[32] The court of appeals also cited (Pet. App. 22a n.15) a statement in the Conference Report that "natural gas qualifying as gas produced from a natural gas stripper well * * * [could be] sold subject to the provisions of sec. 108, rather than taking deregulated treatment as an existing intrastate contract" (H.R. Conf. Rep. 95-1752, *supra,* at 83). That statement, however, is not an explanation of Section 101(b)(5) at all. It appears in the portion of the conference report that discusses Section 105, 15 U.S.C. 3315, and it explains a singular limitation on deregulation set by Section 121(e), 15 U.S.C. 3331(e), for certain Section 105 gas. Under Section 121(e), such gas, which would otherwise be deregulated under Section 121(a), 15 U.S.C. 3331(a), is instead subjected to a ceiling that limits certain price-escalation clauses in producers' contracts (see NGPA § 105(b)(3), 15 U.S.C. 3315(b)(3)). Accordingly, the statement cited by the court of appeals is in fact addressed to an overlap of two regulated categories (§ 108, 15 U.S.C. 3318, and § 105(b)(3), 15 U.S.C. 3315(b)(3)), not to the overlap of a regulated and a deregulated category. (The court of appeals discussed the operation of Sections 105(b)(3), 121(a), and 121(e) elsewhere in its opinion. See Pet. App. 25a-28a.)

Indeed, the provision that the Conference Report statement explains, Section 121(e), supports the Commission's ruling here. In that provision, as in Section 101(b)(5), Congress addressed itself to dual-

C. Deference Is Due To The Commission's Construction Of The NGPA

For all of the above reasons, the court of appeals' decision is erroneous. It creates a bizarre system of natural gas regulation (permitting repeated transfers of natural gas in and out of regulation) that is contrary to the language, history, and overall scheme of the NGPA. That conclusion is compelled using the "traditional tools of statutory construction" (*INS* v. *Cardoza-Fonseca,* No. 85-782 (Mar. 9, 1987), slip op. 24-25), independent of any deference to the Commission.

Even if the statutory meaning were less than crystal clear, however, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation by the * * * agency" that is entrusted with administration of the statute. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (footnote omitted). See also *Clarke* v. *Securities Industry Ass'n,* No. 85-971 (Jan. 14, 1987), slip op. 14-15; *Japan Whaling Ass'n* v. *American Cetacean Society,* No. 85- 954 (June 30, 1986), slip op. 11; *Young* v. *Community Nutrition Institute,* No. 85-664 (June 17, 1986), slip op. 5-7. The Commission is entitled to deference in these cases because the NGPA entrusted the Commission with the "responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly" (*Norwegian Nitrogen Products Co.* v. *United States,* 288 U.S. 294, 315 (1933)). See NGPA § 501, 15 U.S.C. 3411 (granting Commission broad power to carry out the provisions of the

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qualified gas. And Congress specifically provided there that, whenever the regulated category (§ 105(b)(3)) overlapped with a deregulated category (§§ 102, 103, 107(c)(1)-(4), 15 U.S.C. 3312, 3313, 3317(c)(1)-(4)), the deregulated category would be applicable.

NGPA); H.R. Conf. Rep. 95-1752, *supra,* at 69, 116; *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 339. Deference is especially appropriate where, as here, there has been no inconsistency in the agency rulings and "a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters" at issue (*United States* v. *Shimer,* 367 U.S. 374, 382 (1961)). See *INS* v. *Cardoza-Fonseca,* slip op. 23-26; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 837-843. Because the Commission's view that dual-qualified regulated-deregulated gas is deregulated under the NGPA is unquestionably reasonable,[33] it should be upheld.

II. THE COMMISSION PROPERLY RULED THAT MOST NEW TIGHT FORMATION GAS IS AUTOMATICALLY QUALIFIED FOR DEREGULATED TREATMENT

The court of appeals overturned (Pet. App. 18a-19a) the Commission's ruling that most "new tight formation" gas under Section 107(c)(5), 15 U.S.C. 3317(c)(5), is automatically qualified under Section 102(c) or 103, 15 U.S.C. 3312(c), 3313, and hence deregulated, even if the state or federal jurisdictional agency that awards the Section 107(c)(5) qualification does not expressly state that the gas is also being qualified under Section 102 or 103.

[33] Indeed, in comments filed in 1979 in a related rulemaking proceeding (a copy of which has been lodged with the clerk of this Court), respondent Phillips Petroleum Company, among other producers, interpreted the NGPA to require the same result as that reached by the Commission in this proceeding. It stated that Section 121 of the NGPA, 15 U.S.C. 3331, without regard to Section 101(b)(5), required deregulation for all gas in the listed categories, regardless of whether the gas also fell within a regulated category and regardless of whether the regulated or deregulated price was higher. See FERC, *Joint Comments of Indicated Producers* B-11 to B-12 (Oct. 26, 1975). The same comments, we note, also adopted the Commission's position on the question of deregulation of new tight formation gas (*ibid.*).

The court of appeals reached this decision in the course of explaining its broader dual-qualification holding, without distinctly separating the Section 107(c)(5) issue in its discussion. Although the court later modified its initial opinion by expressly noting (Pet. App. 30a) that the Commission has authority to define what gas qualifies under Section 107(c)(5), the court of appeals erred in striking down the Commission's ruling on new tight formation gas.

The Commission has broad authority under Section 501, 15 U.S.C. 3411, "to issue rules and orders under the Act, and to perform any and all acts as it may find necessary or appropriate to carry out the provisions of [the] Act" (H.R. Conf. Rep. 95-1752, *supra,* at 116). That authority encompasses the power "to issue rules and orders necessary to prevent circumvention of the Act" (*ibid.*) as well as the power "to refine definitions of terms provided in the Act in a manner that is consistent with the definitions provided" (*id.* at 69) and to define additional terms (*id.* at 69, 116). See also 124 Cong. Rec. 29109 (1978) (Sen. Jackson). Also, under Section 503, 15 U.S.C. 3413, the Commission is charged with reviewing the qualification determinations of the jurisdictional agencies and is authorized (§ 503(a)(2), 15 U.S.C. 3413(a)(2)) to prescribe in what manner and with what substantiation such determinations must be presented for review. In addition, and more particularly, as the court of appeals recognized in modifying its decision, the Commission is granted the authority to determine what categories of gas "present extraordinary risks or costs" so as to deserve the special pricing of high-cost gas under Section 107(c)(5), 15 U.S.C. 3317(c)(5).

The Commission's ruling on new tight formation gas is an eminently reasonable exercise of its regulatory authority. The definition of "new tight formation" gas states that, with the exception of certain Outer Continental Shelf gas, such gas "is" new gas under Section 102(c) or 103 (18

C.F.R. 271.703(b)). When a producer applies for qualification of certain gas under that definition, all the information required for Section 102 or 103 qualification must be supplied (18 C.F.R. 274.205(e)(1)(i)(A) and (B)), and a determination that the gas is new tight formation gas is necessarily a determination that the gas "is" Section 102 or 103 gas.[34] The Commission merely ruled that the jurisdictional agencies must give effect to that definition by announcing the necessarily implied designation under Section 102 or 103 when they announce the Section 107(c)(5) designation. This ruling reasonably serves to simplify the operation of the NGPA and to prevent circumvention of the statute and of the Commission's definitional rules properly implementing Section 107(c)(5).

Moreover, the ruling is in all relevant respects identical to a Commission decision simply to exclude from the definition of new tight formation gas under Section 107(c)(5) all gas that meets the requirements for qualification under Section 102 or 103. At least now that the latter categories have been deregulated, such a decision would be entirely proper. As we have explained (pages 31-35, *supra*), Congress understood deregulation to be "the maximum economic incentive" provided by the statute (124 Cong. Rec. 28633 (1978)) (Sen. Jackson, explaining Section 107(c)(1)-(4)). It would be, at a minimum, in tension with that understanding for the Commission to use its Section 107(c)(5) definitional authority to grant producers higher prices than market forces would justify. Because a change in the definition of new tight formation gas would accordingly be proper, as the court of appeals may have recognized in modifying its opinion, the Commission's

[34] Indeed, in order to be "new natural gas" under Section 102(c), 15 U.S.C. 3312(c), the gas must be "determined in accordance with section 503" (*ibid.*) by a jurisdictional agency to meet the specified requirements.

Section 107(c)(5) ruling in this proceeding should be upheld.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

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Nos. 87-363 and 87-364

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

PUBLIC SERVICE COMMISSION OF NEW YORK, *et al.*,
Petitioners,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Section 101(b)(5) of the Natural Gas Policy Act of 1978 states that whenever natural gas is qualified in two NGPA pricing categories—one providing a "maximum lawful price," the other providing an "exemption from such a price"—the category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5).

This case presents the question of whether FERC may preclude producers from pricing and selling such dually-qualified gas in a category providing a "maximum lawful price" when that category results in the highest sale price.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-363

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

No. 87-364

PUBLIC SERVICE COMMISSION OF NEW YORK, *et al.*,
Petitioners,
v.
MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENTS MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

STATEMENT

This case presents the question of whether the incentive price for price-regulated natural gas will continue to "be applicable" to such gas under the terms of the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-3432 (1982), if the gas also qualifies in a price-deregulated category. It does not involve an attempt to "choose"

price-regulation over price-deregulation. Pet. Br. 3.[1] It does not involve an attempt to "switch back and forth" between price-regulation and price-deregulation. Pet. Br. 28. Instead, it involves an attempt to determine the "applicable" NGPA pricing category for dually-qualified natural gas, so as to permit private contract pricing provisions to determine the proper sale price.

Section 101(b)(5) of the NGPA determines the "applicable" NGPA pricing category for dually-qualified gas:

> **Sales qualifying under more than one provision.** If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

15 U.S.C. § 3311(b)(5).

This case turns on the meaning of these words. Do they evince an intent to establish a rule requiring that the price-deregulated category always apply? Or do they evince an intent to place dually-qualified gas in the category which results in the highest sale price?

FERC has taken the former position. Approaching the issue with its own agenda, FERC argues that Congress meant for the price-deregulated category to always apply, but rather than simply saying that, chose instead to point to the category "which could result in the highest price" on the belief that contracting parties would compare the existing "maximum lawful price" for the price-regulated category (a finite sum) to the theoretical "maximum" price for the price-deregulated category (an infinite sum) and reach the same result in every case. Pet. App. 111a; Pet. Br. 22. Since the infinite sum is always "highest," the price-deregulated category always applies. *Id.*

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[1] "Pet. Br." refers to the brief of Petitioner Federal Energy Regulatory Commission in No. 87-363. "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 87-363. The statement of the parties to these proceedings, pursuant to Sup. Ct. R. 28.1, appears at pp. i-ii and the addendum to the "Brief in Opposition to Petitions for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit," filed October 30, 1987.

A unanimous panel of the United States Court of Appeals rejected this interpretation. Pet. App. 1a-33a. Based on the unambiguous language of section 101(b)(5), the court held that Congress did not intend to require a pointless, one-sided "comparison" of the finite to the infinite. Pet. App. 16a. Instead, the court found that Congress intended to place dually-qualified gas in the category which resulted in the highest sales price under the terms of the prevailing gas sales contract. Pet. App. 16a. If the contract pricing provisions establish a higher price for price-regulated than price-deregulated gas, the regulated pricing category "shall be applicable." 15 U.S.C. § 3311(b)(5).

A. The Natural Gas Policy Act.

The Natural Gas Policy Act contains carefully worded compromise legislation, meticulously crafted during sixteen months of discussion and debate. 15 U.S.C. §§ 3301-3432; *see generally* Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101 (1980). The final statute reflects "the product of a Conference Committee's careful reconciliation of two strong, but divergent, responses to the natural gas shortage." *Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 331 (1983). At the time of the NGPA, the nation faced a "serious production shortage[]" as a result of the pricing policies implemented by FERC's predecessor, the Federal Power Commission ("FPC"), under the terms of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w (1982). *Mid-Louisiana*, 463 U.S. at 330;

Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board, 474 U.S. 409, 420 (1986). Interstate gas prices, which the FPC had determined on a "historical-cost-based," multi-tiered "rate scheme," remained "substantially below the unregulated prices available for intrastate sales, and the interstate supply remained inadequate." *Mid-Louisiana*, 463 U.S. at 330-31. As a result, the interstate market had begun to command supplies of higher-priced gas from unregulated foreign suppliers, a development which concerned the members of Congress.[2] Domestic suppliers, meanwhile, had little incentive to develop additional supplies for the interstate market. *Mid-Louisiana*, 463 U.S. at 330-31; *Transcontinental*, 474 U.S. at 420-21; Note, 59 Tex. L. Rev. at 112. Clearly, "a new system of natural gas pricing was needed to balance supply and demand." *Transcontinental*, 474 U.S. at 421.

The two Houses of Congress disagreed on the proper approach. On one side, the House of Representatives had passed a bill extending federal price ceilings to all sales, interstate and intrastate, at levels high enough to provide increased incentives for production. H.R. 8444, 95th Cong., 1st Sess. (1977). The stated purpose of this bill was "to bring the natural gas market into better balance by reducing the demand for natural gas and increasing the supply through the establishment of a uniform and incentive-based pricing system for new natural gas which provides fair and equitable producer revenues and protects consumers." H.R. 8444, § 401(b)(1), 95th Cong., 1st Sess. (1977).

On the other side, "[t]he Senate-passed bill embodied a significantly different approach to the natural gas

[2] *See, e.g.*, 124 Cong. Rec. 28,891 (1978) (Sen. Randolph) ("We need assurances of a stable rate of production and supply. This will not be accomplished by relying on high prices from [sic] liquid natural gas from such countries as Algeria, Mexico and Indonesia.").

pricing policy issue than that adopted by the House."[3] Although the "goals of nearly every Member of the Senate [were] the same—an assured supply of natural gas, an attempt to reduce our national dependence on foreign oil and an ultimate concern for the energy health of this country," the "suggested routes for achieving those goals [were] apparently as numerous and as divergent as the membership of this body." 124 Cong. Rec. 31,838-39 (1978) (Sen. Hatfield). The final Senate bill would have left intrastate sales unregulated and deregulated most new gas in two years. S. 2104, 95th Cong., 1st Sess., 123 Cong. Rec. 32,306 (1977).

Faced with "a close vote in the Senate to deregulate and a close vote in the House to regulate," the Conference Committee "did the most sensible thing that one could do under all the circumstances." 124 Cong. Rec. 28,634-35 (1978) (Sen. Jackson). The Committee reconciled "these two very different bills" and reached a "compromise that Democrats and Republicans, consumers and producers, could stand behind." Conf. Rep. at 68; 124 Cong. Rec. 31,844 (1978) (Sen. Byrd). In the end, the result was "a bill which does not give any of the players everything he would like"; "[i]f you are a total regulator or if you are a total deregulator, this bill will not please you." 124 Cong. Rec. 31,842-43 (1978) (Sen. Muskie); 124 Cong. Rec. 28,882 (1978) (Sen. Bumpers).

Under the NGPA, Congress gave FERC "a fundamentally different regulatory obligation, a narrower authority" to administer pricing than either FERC or the FPC had under the Natural Gas Act. *Pennzoil Co. v. FERC*, 645 F.2d 360, 379 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). While the NGA authorized those agencies to set prices under a broad, discretionary "just and reasonable" standard, the NGPA charged FERC only with

[3] H.R. Conf. Rep. No. 1752, 95th Cong., 2d Sess. 68, *reprinted in* 1978 U.S. Code Cong. & Admin. News 8983, 8984 [hereinafter "Conf. Rep."].

administering a national "incentive pricing scheme" under express guidelines from Congress. 15 U.S.C. §§ 3312-19; *Mid-Louisiana*, 463 U.S. at 322, 333; *Amoco Production Co. v. Western Slope Gas Co.*, 754 F.2d 303, 305 (10th Cir. 1985).

At the outset, Title I of the NGPA established "an exhaustive categorization of natural gas production." *Mid-Louisiana*, 463 U.S. at 332-33. Eight categories are described in sections 102 through 109 of the statute. 15 U.S.C. §§ 3312-19. Because these categories were "designed to be exhaustive," "all natural gas production falls within at least one of the categories." 463 U.S. at 333.

The statute then "explicitly establishes an incentive pricing scheme that is wholly divorced from the traditional historical-cost methods" that the FPC had applied in implementing the NGA. *Id.* For each NGPA category, Congress either set a maximum lawful price or provided FERC with express guidelines for the calculation of such a price. 15 U.S.C. §§ 3312, 3319; *Mid-Louisiana,*, 463 U.S. at 332. These price ceilings varied widely between the categories, reflecting Congress' desire to "provide investors with adequate incentives to develop new sources of supply" while maintaining a consumer price protection approach on old, existing sources of supply. *Mid-Louisiana*, 463 U.S. at 334; Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101 (1980).

Certain NGPA price ceilings ran counter to the interests of producers. Section 105, for example, "expanded federal control, since it granted FERC jurisdiction over the intrastate market for the first time." *Transcontinental*, 474 U.S. at 421; *Oklahoma v. FERC*, 661 F.2d 832 (10th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982). Although the elected representatives of the producing states had attacked this section as extending "price controls and regulation to the only free market we have, the intrastate market," Congress enacted the section and established a specific pricing formula for intrastate gas. 124 Cong. Rec. 28,589 (1978) (Sen. Hansen); 15 U.S.C. § 3315. At the same time, Congress also established a relatively low ceiling price for "old" interstate gas under section 104, reasoning that "previously dedicated gas needs no incentive since, by definition, it is economically producible under old prices." 15 U.S.C. § 3314; Note, 59 Tex. L. Rev. at 119.

In other NGPA sections, however, Congress favored the producers with incentive pricing on the belief that "[w]hether or not the old NGA rates were in fact sufficient to stimulate some production from those categories, . . . the Nation's energy needs justified the higher, statutory rate." *Mid-Louisiana*, 463 U.S. at 335-36. These sections created production incentives by concentrating the "rewards of higher prices where they are most needed—on the development of new, high-cost gas." 124 Cong. Rec. 28,633 (1978) (Sen. Jackson); Note, 59 Tex. L. Rev. at 119. Accordingly, Congress reserved its highest incentive prices for "new gas" under sections 102 and 103, "high-cost gas" under section 107, and "stripper well gas" under section 108. 15 U.S.C. §§ 3312, 3313, 3317, 3318.

Two of these incentive categories are principally relevant to this case: "stripper well" gas under section 108, and high-cost "tight formation gas" under section 107 (c)(5). 15 U.S.C. §§ 3317(c)(5), 3318. "Section 108's purpose is to provide a special price for wells with low production volumes because, absent an incentive price, the revenues therefrom may not cover the out-of-pocket operating costs of maintaining production." *Ecee, Inc. v. FERC*, 645 F.2d 339, 355 (5th Cir. 1981). Section 107 (c)(5) was designed to encourage production from conditions that FERC determined to present "extraordinary risks or costs," such as "tight formations with little permeability, including Western tight sand formations."

Conf. Rep. at 87; 15 U.S.C. § 3317(c)(5). Under this section, Congress intended for FERC to designate such conditions "in advance of drilling activity, in order to create price incentives." Conf. Rep. at 88. Congress further emphasized that the special incentive prices under section 107 "are not intended . . . to be cost-based in nature, and do not require cost justification." *Id.* Instead, those prices would reward the producer for "extraordinary risks" inherent in the drilling activity. *Id.*

Having defined a total of eight incentive and non-incentive pricing categories, Congress then provided for the phased-in price-deregulation of *certain* of these categories during the years 1979-87. Section 121 of the NGPA sets forth this system of phased-in, partial deregulation. 15 U.S.C. § 3331.[4] In drafting this section, the Conference Committee carefully noted that it "does not provide for deregulation of any natural gas production not specifically enumerated in this section." Conf. Rep. at 92. Categories that are not mentioned, including "old" gas under section 104, high-cost tight formation gas under section 107(c)(5), and stripper well gas under section 108, are never price deregulated. 15 U.S.C. § 3331; Conf. Rep. at 92; *Mid-Louisiana*, 463 U.S. at 336 n.14.

Against this background of complex, overlapping categories and prices, Congress established several "rules of general application to be used in interpreting this Act." Conf. Rep. at 74; 15 U.S.C. § 3311(b). One such rule of construction defines the relationship between the maxi-

[4] In section 121, Congress provided that deep wells, geopressured brine wells, coal seam wells and Devonian shale wells would deregulate and become exempt from any price ceiling on an effective date of November 9, 1979. 15 U.S.C. §§ 3317(c)(1)-(4), 3331(b). New wells under section 102, certain new onshore production wells under section 103, and certain intrastate wells under sections 105 and 106, would deregulate and become exempt from any price ceiling on January 1, 1985. 15 U.S.C. § 3331(a). Certain other new onshore production wells would deregulate and become exempt from any price ceiling on July 1, 1987. 15 U.S.C. § 3331(c).

mum lawful prices (or exemptions therefrom) established in the NGPA and the contract prices specified in gas purchase agreements between buyers and sellers. 15 U.S.C. § 3311(b)(9).[5] In section 101(b)(9), Congress confirmed that the NGPA does not entitle the seller to any particular gas price. Congress contemplated that private contracts, not the NGPA, would govern the relationships of buyers and sellers, and "section 101(b)(9) is Congress' express and specific intent not to preempt the ability of private persons to contractually govern their relationship." *Pennzoil Co. v. FERC*, 645 F.2d at 375. For any "first sale" of natural gas, the sale price is equal to the contract price so long as that contract price "does not exceed" the applicable category's ceiling price. 15 U.S.C. § 3311(b)(9). FERC has no authority to "nullify" a lawful first sale contract price. *Id.*

One other "rule of general application" is the very heart of this case. In section 101(b)(5), Congress provided a rule for the inevitable occasions when a single well qualified in more than one price-regulated (or deregulated) category:

> **Sales qualifying under more than one provision.** If any natural gas qualifies under more than one provision of this subchapter providing for any maximum lawful price or for any exemption from such a

[5] Section 101(b)(9) provides:

> **Effect on contract price.** In the case of (A) any price which is established under any contract for the first sale of natural gas and which does not exceed the applicable maximum lawful price under this subchapter, or (B) any price which is established under any contract for the first sale of natural gas which is exempted under part B of this subchapter from the application of a maximum lawful price under this subchapter, such maximum lawful price, or such exemption from such a maximum lawful price, shall not supercede or nullify the effectiveness of the price established under such contract.

15 U.S.C. § 3311(b)(9).

price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

15 U.S.C. § 3311(b)(5).

Gas qualifying under more than one category has been termed "dual category" or "dually-qualified" natural gas. Pet. App. 73a-75a. For example, certain stripper wells that qualified for incentive pricing under section 108 by virtue of their low output might also qualify as "old" wells under section 104, "new" natural gas wells under section 102, or Devonian shale wells under section 107(c)(4). Pet. App. 73-75a. Certain "tight formation" wells that have qualified for incentive pricing under NGPA section 107(c)(5) could also qualify as "new" wells under section 102 or 103.

In each of these cases, section 101(b)(5) expressly assures the producer that "the provision which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5). "[T]he provisions that permit the seller to obtain the highest price applies." Conf. Rep. at 74. In a compromise statute filled with provisions both beneficial and detrimental to the producer, section 101(b)(5) stands out as a key provision which favors the interests of the producer.

B. Natural Gas Category Determinations.

As a threshold matter, the operation of the NGPA incentive pricing scheme depends upon the determination of the appropriate category or categories for each individual well. Although Congress created a "comprehensive" and "exhaustive" set of eight natural gas categories, it did not presume to determine the proper categories for thousands of wells located throughout the United States. Nor did Congress want FERC to do so. Instead, Congress gave this authority to state and federal agencies "having regulatory jurisdiction with respect to the production of natural gas." 15 U.S.C. § 3413(c).[6] The determinations would be made upon application from the producer, subject to FERC review, but "there is no intention to allow the Commission to 'second guess' the agency by independently weighing the evidence and reversing the agency's determination as if the initial responsibility to make the determination were placed within the Commission." Conf. Rep. at 118.

Under this system, the producer must consider the terms of his contract, the terms of the NGPA, and the characteristics of his well before initiating his application. "It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him." 124 Cong. Rec. 38,364 (1978) (Explanation Statement prepared by Reps. Dingell, Staggers, Ashley, Eckhardt and Wilson). And, "[i]f a seller wishes to change the category under which production from a given well qualifies, he must apply to the appropriate State or Federal agency with authority to make determinations under section 503." Conf. Rep. at 74.

C. Order Nos. 406 and 406-A.

Against this statutory background, FERC issued a Notice of Proposed Rulemaking in Docket No. RM84-14-000 on September 13, 1984, describing proposed rules designed to implement NGPA section 121(a) and facilitate the next phase of deregulation, which was then scheduled for January 1, 1985. Pet. App. 34a-60a. Among other things, FERC proposed that individual well category determinations under section 503 would continue after January 1, 1985 for all categories, including those that were slated for deregulation on that date. Pet. App. 38a.

[6] With regard to federal lands, this jurisdiction rests with the Bureau of Land Management of the United States Department of the Interior. *See Williston Basin Interstate Pipeline Co. v. FERC*, 816 F.2d 777, 781 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 748 (1988).

Relatedly, FERC proposed that producers who had qualified wells as "new tight formation gas" under section 107(c)(5) prior to January 1, 1985 had necessarily filed "the same information, in addition to other information" as was required to qualify under sections 102 and 103. Pet. App. 41a. FERC therefore proposed to "implicitly" determine that any well qualified as "new tight formation gas" under section 107(c)(5) also qualified in one or both of those price-deregulated categories. Pet. App. 41a-42a.

Finally, FERC proposed that based on the "overall scheme" of the NGPA, it "believe[d] that Congress intended all price controls for gas specified in section 121 to terminate on January 1, 1985, whether or not the gas continued to qualify for a regulated price." Pet. App. 43a-44a. While conceding that section 101(b)(5) "[a]rguably" pr~~ovided tha~~t the gas would "remain regulated if the regulated price is higher than the deregulated price," FERC queried "whether Congress intended this section to supersede the explicit statutory requirement of deregulation in section 121." Pet. App. 44a.

On November 16, 1984, FERC issued its "final rule" in the form of Order 406. 18 C.F.R. § 270.208 (1987); Pet. App. 61a-103a. FERC focused much of its attention on the "significant deregulation issue" presented by dually-qualified natural gas. Pet. App. 74a. Claiming that section 101(b)(5) was "helpful, but not dispositive" on the issue, FERC turned instead to its own perception of "Congressional intent," the "overall scheme" of the NGPA, and the "mandatory" nature of deregulation under section 121. Pet. App. 75a-79a. Here FERC concluded that "[i]t is our belief that the statutory intent to deregulate takes precedence over the statute's increased supply objective." Pet. App. 77a. Based on this "belief," FERC reaffirmed its "position" that "[g]as that is dually-qualified must be considered deregulated under the NGPA." Pet. App. 75a. FERC then rejected producers' claims of reliance on the regulated incentive prices for

dually-qualified gas, finding that their reliance was "misplaced" because "[i]t should have been clearly understood that the incentive price was to be statutorily removed." Pet. App. 79a.

FERC then turned to the proper treatment of "new tight formation gas" under section 107(c)(5). Here again, FERC reaffirmed its view that such gas was "implicitly" qualified as section 102(c) or 103 gas because "[s]uch gas is obviously qualified for both categories . . ., regardless of whether that was explicit at the time that the determination was made." Pet. App. 82a. When coupled with FERC's earlier ruling on the "mandated" deregulation of dually-qualified gas, this ruling enabled FERC to insure that contract pricing provisions entitling the producer to regulated incentive prices for price-regulated gas would *not* apply to section 107(c)(5) wells, even though that category remained subject to price regulation. Pet. App. 81a-82a.

Eighteen parties, including the respondents in this case, sought rehearing of Order 406. Pet. App. 105a. FERC acted on those petitions in Order 406-A, issued December 21, 1984. Pet. App. 104a-126a. On the issue of dually-qualified gas, FERC maintained its "position" that "section 121 mandates deregulation," even though section 121 said nothing on the subject of dually-qualified gas and, indeed, did "not provide for deregulation of any natural gas production not specifically enumerated in this section." Conf. Rep. at 92. At the same time, however, FERC also proclaimed a new interpretation whereby section 101(b)(5) itself "compels" the deregulation of dually-qualified gas. Pet. App. 111a. FERC reasoned that since section 101(b)(5) directs that the NGPA category which "could result in the highest price" shall apply, it was proper to compare the theoretical "maximum" price under price-deregulation (an infinite sum) with the real maximum lawful price under existing regulation (a finite sum). *Id.* Under this "comparison,"

the price-deregulated category would *always* carry the higher price, so that the deregulated category would *always* apply to gas that was qualified in both regulated and deregulated categories. *Id.*

D. The Court of Appeals' Decision.

A unanimous panel of the United States Court of Appeals rejected this novel construction of the statute. Pet. App. 1a-24a. Acting on petitions for review filed by the respondents in this proceeding, the court of appeals held that section 101(b)(5) required application of the pricing category "which could result in the highest price" under the terms of the existing private sales contract for the gas. Pet. App. 16a-17a; 15 U.S.C. § 3311(b)(5).

The court discerned that the NGPA pricing system was an "intricate balance of uniform price ceilings, incentive prices, and partial phased deregulation." Pet. App. 5a. In section 121, "[t]he deregulation proponents achieved a phased elimination of many, but not all" of the price ceilings. Pet. App. 7a. "[O]ld gas is not deregulated" and "of particular importance in this case, the NGPA does not include § 107(c)(5) tight formation gas or § 108 stripper well gas on the face of the deregulation provisions of § 121." Pet. App. 7a-8a.

FERC had interpreted section 121 to "mandate" deregulation of any gas determined to be "in one of the listed categories, . . . even if the gas has also been determined to be in a category that is not listed." Pet. App. 10a. The Conference Committee Report, however, had emphasized that section 121 "does *not* provide for deregulation of any natural gas production not specifically enumerated." Conf. Rep. at 92 (emphasis supplied). And this Court had held that section 121 provided for the "'ultimate decontrol of *a number of categories* of natural gas.'" Pet. App. 11a (quoting *Mid-Louisiana*, 463 U.S. at 336 n.14) (emphasis in original). Therefore, the court of appeals held that section 121 was ambiguous with respect to the treatment of gas qualified in both listed and unlisted categories. Pet. App. 11a.

In section 101(b)(5), however, Congress had "anticipated precisely this question." Pet. App. 11a. Recognizing that section 101(b)(5) applied to gas qualified in both regulated and deregulated pricing categories, the court held that this section addressed the very "question of which category shall apply when gas has been determined to qualify both for a regulated category and a deregulated category." Pet. App. 15a.[7] The category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5); Pet. App. 16a-17a.

Here, the court noted that FERC construed the section "to provide the same answer to this question in every case: the deregulated category will always apply." Pet. App. 15a. This construction, however, was based "on the obvious truth that the price of deregulated natural gas in an open market 'could' theoretically reach infinity." *Id.* According to FERC, the proper comparison was between this theoretical price and the very real ceiling price in existence at that time, rather than any similarly theoretical ceiling price. Pet. App. 15a-16a.[8]

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[7] In the court of appeals, FERC had argued that although section 101(b)(5) referred to categories providing for an "exemption from such a price," this language did *not* refer to the deregulated categories. Pet. App. 14a-15a. The court of appeals rejected this argument, noting that FERC itself had used the term "exemption" to refer to deregulated categories. *Id.* Indeed, FERC had affirmatively stated that section 101(b)(5) applied to dually-qualified regulated-deregulated gas. *See, e.g.*, Interim Rule Covering High-Cost Natural Gas Produced from Tight Formations, 45 Fed. Reg. 13,414, 13,422-23 (1980) ("Under section 101(b)(5), gas qualifying under one or more categories receives the highest maximum lawful price for which it is eligible, including a deregulated price, if applicable."). FERC has expressly elected to "not renew" this argument to this Court. Pet. Br. 21 n.20.

[8] As the court of appeals recognized (Pet. App. 15a-16a), FERC has the authority to adjust certain ceiling prices at will. *See* 15

In rejecting this strained construction, the court held that the word "could" makes sense "only in the context of how gas sales actually occur." Pet. App. 16a. Congress understood that gas sales occur under the terms of private contracts, not under the terms of the NGPA. Pet. App. 16a-17a. Accordingly, the proper comparison was between the contract price for price-regulated gas in the regulated category and the contract price for price-deregulated gas in the deregulated category. *Id.* In the end, the NGPA provision that "could result in the highest price" under the contract would apply. *Id.*

In reaching this decision, the court also rejected FERC's view that the producers were seeking a "choice" or "election" between the price-regulated and price-deregulated categories. Pet. App. 18a. The court found that section 101(b)(5) "does not speak in terms of a choice or an election," but rather states that "whichever category could produce a higher price *shall* apply." *Id.* (emphasis in original). The producers have no "choice" in the treatment of dually-qualified gas. *Id.* The producers do, however, have a "choice as to which category or categories for which they seek to qualify particular gas." *Id.* And it was for this reason that FERC's views on the "implicit" qualification of all section 107(c)(5) "new tight formation gas" as "new gas" under sections 102 and 103 could not stand. Pet. App. 18a-19a. The court held that "[t]here is no support for such automatic determinations in the NGPA." Pet. App. 18a. Because there was no basis for the "assumption that gas can be determined to qualify for a particular category without going through the specific determination procedure set forth in § 503," FERC's conclusions on the treatment of new tight formation gas could not be upheld. Pet. App. 19a.

U.S.C. §§ 3314(b)(2), 3317(b). In theory, then, these ceilings "could" reach the same infinite values that FERC ascribes to the deregulated categories.

SUMMARY OF ARGUMENT

The unanimous opinion of the court of appeals is correct. Section 101(b)(5) requires that natural gas which is dually-qualified in price-regulated and price-deregulated categories shall be treated in the category that "could result in the highest price" under the terms of the existing private sales contract for that gas.

A. The text of section 101(b)(5) is clear and unambiguous: for all "sales qualifying under more than one provision,"—including provisions "providing for any maximum lawful price" or for "any exemption from such a price"—the provision "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5). This rule means what it says. When gas is qualified in two NGPA categories, each with a different "sale" price under the terms of the prevailing contract, the category which could result in the "highest price" shall apply.

Congress chose these words for a reason. At the time of enactment, Congress understood that gas would be priced and sold under the terms of private contracts, most of which would set different prices for different categories of gas, including price-regulated and price-deregulated categories. Therefore, a rule was needed for those cases where a given well qualified in two or more categories. The issue was which category would apply for purposes of the contract pricing provisions, so as to permit *those provisions* to determine the proper sale price. Clearly, the NGPA itself would not require or "result" in the payment of *any* particular price for dually-qualified (or singly-qualified) gas.

With this in mind, Congress enacted a provision stating that whenever a particular well qualified in both a price-regulated and a price-deregulated category, the category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5). Congress would not have enacted this provision if it wanted to establish

a simple rule requiring that all dually-qualified gas be treated as price-deregulated gas. Clearly, Congress did not envision any such automatic rule. What Congress wanted was a comparison of the prices "which could result," *i.e.*, a comparison of the actual sale prices payable under the terms of the sales contract covering the well in question.

Seeking to escape the text of the statute, FERC now admits that the statute requires a price comparison. Pet. Br. 22-23. But FERC contends that since the NGPA is not "concerned" with private contract prices, the proper "comparison" is between the existing statutory incentive price and the theoretically infinite exempt price potentially available at some indefinite future time. Because this speculative infinite price is always "higher" than any finite price, the exempt category always applies. In short, FERC believes that Congress chose to say that "the higher of A or B applies" when it knew all along that B was *always* higher and when it could have said "B always applies." This theory defies common sense.[9]

B. The legislative history of the NGPA solidly supports the construction adopted by the court of appeals. Not only does that history reveal no "clearly expressed legislative intention" contrary to the language of the statute, it actually contains two authoritative statements supporting its natural meaning. Moreover, section 101(b)(5) is fully consistent with the "broad purpose" of the NGPA. As this Court has recognized, the "broad purpose" of the NGPA was to assure adequate

[9] FERC is obviously correct in noting that the NGPA "leaves the establishment of actual sale prices to private decision." Pet. Br. 19. That is just the point. Because sale prices are privately established, a comparison of the sale prices for price-regulated and price-deregulated gas will yield different results in different cases. The purpose of the comparison is to determine the higher of those two prices in a particular case. In contrast, FERC proposes a purposeless "comparison" that always yields the same result.

supplies of natural gas at fair prices. It was *not* to achieve price-deregulation in the abstract. Phased-in, partial deregulation was simply one *means* of fulfilling the "broad purpose" of adequate supplies at fair prices. Incentive pricing for difficult-to-produce gas was another. In this case, section 101(b)(5) simply operates to insure producers the incentive pricing they relied upon in their search for difficult-to-produce gas.

C. Because the intent of Congress is clear and unambiguous, the Court should not defer to a contrary interpretation of the agency. FERC has no power to correct perceived flaws in the statute it administers. If FERC believes that a new compromise is justified under today's economic conditions, FERC should raise the matter with Congress, not this Court. Elected representatives of the producing and consuming states could then debate not just section 101(b)(5), but other provisions of the statute as well.

D. In attempting to avoid the clear impact of section 101(b)(5), petitioners in No. 87-364 suggest that any reference to that section is "simply wrong" because section 121 unambiguously mandates the deregulation of dually-qualified gas. Br. 10-11. Even FERC does "not renew" this argument, and with good reason. Basic tenets of statutory construction establish that Congress enacted section 101(b)(5) to directly address the question of dually-qualified gas. In contrast, section 121 does not even mention dually-qualified gas and, indeed, is limited in application only to the "specifically enumerated" categories. The silence of section 121, combined with the plain language of section 101(b)(5), requires that this case turn on section 101(b)(5).

E. In determining whether a well is dually-qualified for purposes of section 101(b)(5), it is necessary to focus upon the well category determinations made by the state and federal jurisdictional agencies with authority

to make those determinations. FERC has no power to make well category determinations under section 503 of the NGPA. 15 U.S.C. § 3413. FERC's ruling, therefore, that all new tight formation wells under section 107(c)(5) of the NGPA are "automatically" and "implicitly" new wells under section 102 or 103 exceeds the bounds of its authority.

ARGUMENT

There is no dispute that the NGPA reflected a carefully-crafted legislative compromise, designed "to assure adequate supplies of natural gas at fair prices." *Transcontinental*, 474 U.S. at 421. Nor is there any dispute that this single "broad purpose" can be seen in a wide range of provisions, some of which favor the consumer, some of which favor the producer, and some of which are more neutral in their application. Some categories of gas are kept forever regulated at low prices.[10] Other categories of gas are kept forever regulated at higher prices. 15 U.S.C. §§ 3317(c)(5), 3318. Still other categories of gas are price-regulated initially and then deregulated over time as part of a system of phased-in, partial deregulation. 15 U.S.C. § 3331.

As part of this overall legislative compromise, Congress enacted a provision to cover those situations where gas qualified in more than one pricing category, including price-regulated and price-deregulated categories. This provision is section 101(b)(5). 15 U.S.C. § 3311(b)(5). In a complex and highly technical statute, with provisions both favorable and unfavorable to the producer, this one provision clearly and unambiguously favors the interests of the producer.[11] It does not say that dual-category gas

[10] For example, some old gas remains regulated at "below-market" ceiling prices ranging between $.50 and $1.00 per MMBtu. 15 U.S.C. § 3314; 53 Fed. Reg. 3,019, 3,020 (1988) (publication of current maximum lawful prices).

[11] To the extent that FERC wishes to characterize this provision as a "producer-assistance policy" (Pet. Br. 19), it should char-

shall always be treated in the price-regulated category. It does not say that dual-category gas shall always be treated in the price-deregulated category. It says that the category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5).

FERC is now trying to construe this provision away. Relying on its own perception of the "overall scheme" of the NGPA, FERC argues for a construction that is at war with the words of the statute and devoid of support in the legislative history. This Court should reject FERC's construction and affirm the opinion of the United States Court of Appeals.

A. The Court of Appeals Correctly Concluded That When "Sales Qualify Under More Than One Provision," Section 101(b)(5) Requires That the Provision Which Could Result in the Highest Sale Price Shall Apply.

"The starting point in statutory interpretation is 'the language of the statute itself.'" *United States v. James*, 106 S. Ct. 3116, 3121 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). "[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States v. Locke*, 471 U.S. 84, 95 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

The words of section 101(b)(5) are as follows:

> **Sales qualifying under more than one provision.** If any natural gas qualifies under more than one pro-

acterize other sections of the NGPA, such as section 104, as a "consumer-assistance policy." *See supra* note 10; *see also* A. Tussing & C. Barlow, *The Natural Gas Industry: Evolution, Structure & Economics* 114-16 (1984) (NGPA a "hodgepodge" of pro-consumer and pro-producer rules).

> vision of this subchapter providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable.

15 U.S.C. § 3311(b)(5).

FERC argues that this language means that whenever natural gas qualifies in both a price-regulated and a price-deregulated category, the deregulated category always applies. "The short answer," however, "is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979). If Congress wanted to write section 101(b)(5) to deregulate all gas qualifying in both a regulated and a deregulated category, it surely would have done so. Congress easily could have written a single sentence which clearly and simply provided for the price-deregulation of all gas qualifying in both regulated and deregulated categories.[12] Congress did not do that.[13] Instead, Congress provided that the category "which could result in the highest

[12] FERC has suggested that the reason Congress did not provide that "all gas qualifying under any provision providing for an exemption from a maximum lawful price shall be considered exempt" was that Congress wanted to cover both the regulated-deregulated and the regulated-regulated cases in a "single sentence." Pet. Br. 24. In the unlikely event that this were true, Congress could have provided that "any gas qualifying under more than one provision providing a maximum lawful price shall be treated under the provision which sets the highest price, and any gas qualifying under any provision providing an exemption from such a price shall be considered exempt."

[13] *Compare North Haven Bd. of Education v. Bell*, 456 U.S. 512, 521 (1982) ("After all, Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of § 901(a)."); *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 108 S. Ct. 376, 381 (1987) ("Congress could have phrased its requirement in language that looked to the past ('to have violated'), but it did not choose this readily available option.").

price shall be applicable." 15 U.S.C. § 3311(b)(5). Neither Congress nor any other competent draftsman would use this language if it wished to reach the same result—price-deregulation—in every case. Congress chose its words for a reason, and it is this Court's "duty 'to give effect, if possible, to every clause and word of a statute,' rather than to emasculate an entire section, as the Government's interpretation requires." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Township of Montclair v. Ramsdell*, 107 U.S. 147, 152(1883)). Surely, the Court cannot assume that Congress engaged in careless draftsmanship in a statute as carefully-crafted as the NGPA.[14]

Congress understood that natural gas is priced and sold under the terms of private contracts.[15] Congress further understood that NGPA provisions do not in fact *or theory* "result" in the payment of any price.[16] Those provisions can only "result" in prices to the extent that they are referenced or incorporated in the terms of pri-

[14] *Compare Griffin v. United States*, 537 F.2d 1130, 1136 (Temp. Emer. Ct. App.) ("[W]e should not be quick to assume accidental or careless language on the part of Congress where considerate purpose may be seen in the words it employed."), *cert. denied*, 429 U.S. 919 (1976).

[15] *See supra* pp. 8-9; *see also* Conf. Rep. at 120 ("the seller may collect . . . the appropriate maximum lawful price . . . if the contract so permits"); Conf. Rep. at 74 ("In no case may a seller receive a higher price than his contract permits."); 2A C. Sands, *Sutherland Statutory Construction* § 45.12 (4th rev. ed. 1984) (legislative language must be interpreted by courts on the assumption that the legislature was aware of relevant statutes and facts).

[16] FERC continues to recognize and emphasize this fact. *See* 53 Fed. Reg. 3,754, 3,756 (1988) ("The Commission notes that high-cost gas prices established pursuant to section 107(c)(5) of the NGPA represent a maximum lawful ceiling price. The Commission does not guarantee that producers can collect these prices. Nor does the Commission require customers to pay this ceiling price.").

vate contracts. Therefore, when Congress wrote a statute providing that the "provision which could result in the highest price shall be applicable," Congress understood what it was saying: when a well is dually-qualified in a price-regulated and a price-deregulated category, the category which could result in the highest sale price under the terms of the sales contract for that well will apply.[17]

"[G]iven the plain terms of the statute, 'it requires some ingenuity to create ambiguity.'" *United States v. James*, 106 S. Ct. at 3121 (quoting *Rothschild v. United States*, 179 U.S. 463, 465 (1900)). From the outset, FERC has demonstrated an unusual degree of ingenuity in this case. After twice attempting to avoid section 101(b)(5) altogether, FERC now concedes that that section controls the treatment of dually-qualified regulated-deregulated gas. Pet. Br. 21 n.20.[18] In abandoning its

[17] Throughout its brief, FERC attempts to create the impression that this reading of section 101(b)(5) will foment widespread regulatory chaos. *See, e.g.*, Pet. Br. 28. This is simply not the case. Like countless other parties to commercial contracts, gas buyers and gas sellers will perform the necessary comparisons and make the necessary price adjustments under the terms of their private contracts. Pet. App. 16a n.11. FERC will have no involvement whatsoever.

[18] FERC has continually shifted and modified its position on section 101(b)(5). In its Notice of Proposed Rulemaking, FERC took the position that section 121 mandated the deregulation of all dually-qualified regulated-deregulated gas, and that section 101(b)(5) was only "[a]rguably" involved. Pet. App. 44a. After receiving comments on the issue, FERC modified its position to assert that section 101(b)(5) was "helpful, but not dispositive." Pet. App. 78a. Then, when the court of appeals issued an opinion finding that section 101(b)(5) was not only "helpful" but also "dispositive" and adverse to FERC's approach, FERC modified its position for a third time, so that it is now claiming that section 101(b)(5) is "dispositive" and unambiguously *supportive* of its approach. Pet. Br. 21-27. Nowhere in the original Notice of Proposed Rulemaking did FERC articulate this theory of unambiguous, dispositive support.

earlier arguments, however, FERC remains unwilling to abandon its preconceived result.

Looking at the terms of the statute, FERC now admits that the category "which could result in the highest price" shall apply. 15 U.S.C. § 3311(b)(5). But FERC attempts to sidestep the natural meaning of these words by arguing that they refer to "the range of legally permitted possibilities." Pet. Br. 24. Therefore, in determining the price that "could result" for price-deregulated gas, FERC suggests that the Court should focus on the infinite price that "could" become available in some hypothetical world of the future. Pet. Br. 24-25. In determining the price that "could result" for price-regulated gas, however, FERC suggests that the Court should focus not on some equally hypothetical incentive price of the future, but on the maximum lawful price of today. *Id.* Finally, FERC "compares" these two "prices" and finds that "the result of the required comparison is always the same for regulated-deregulated gas" (Pet. Br. 24-25), *i.e.*, the infinite "price" is always highest and the deregulated category always applies.

The only problem is that Congress did not ask for this "comparison"; it did not provide that "the provision which *sets* the highest price shall be applicable." Instead, Congress provided for a comparison of the prices which "*could result*" under a provision providing "for any maximum lawful price" and a provision providing "for any exemption from such a price." 15 U.S.C. § 3311(b)(5). Congress clearly contemplated that there would be some actual defined price attached to each category, *including the deregulated category*.

That actual defined price is the contract sale price. Contract prices are *real* values requiring a *real* comparison, and it is this real comparison that Congress chose to require—not a hollow comparison between a finite and an infinite sum. "It cannot be presumed that the legislature would do a futile thing." 2A C. Sands, *Sutherland*

Statutory Construction §§ 45.12, 46.06 (4th rev. ed. 1984).

B. Congress Intended for the Provision Which Could Result in the Highest Sale Price to Apply.

This Court has "repeatedly recognized" that when " 'the terms of a statute [are] unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.' " *United States v. James*, 106 S. Ct. at 3122 (citation omitted). Those circumstances require " 'something to make plain the intent of Congress that the letter of the statute is not to prevail.' " *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978) (citation omitted). "[W]e look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 107 S. Ct. 1207, 1213 n.12 (1987).

1. *The Legislative Statements on Section 101(b)(5) Show That Congress Intended To Treat Dually-Qualified Gas in the Category Which Could Result in the Highest Sale Price.*

In this case, the legislative history strongly supports the unambiguous text of section 101(b)(5). Nowhere does the history contain any statement of "clearly expressed legislative intention" contrary to the text of the provision; in fact, the history contains two authoritative statements supporting the "natural meaning" of that text. The first appears in the "Explanation Statement" prepared for the House of Representatives by the House conferees (Reps. Dingell, Staggers, Ashley, Eckhardt and Wilson). 124 Cong. Rec. 38,363-64 (1978). In discussing section 101(b)(5), the conferees emphasized that although that section determined the proper treatment of dually-qualified natural gas, it did

> not impose upon either the FERC or any state agency an affirmative obligation to identify which of several potential classifications should apply. It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him (in most cases that will be the designation which also yields the highest price).

124 Cong. Rec. 38,363-64 (1978).

Therefore, when a producer examines section 101(b)(5) and its relationship to the pricing categories in sections 102-109, he is not to consider ceiling prices (or exemptions therefrom) in the abstract. Rather, he is to determine the category of the "greatest benefit *to him*," which will presumably be the category which "*yields* the highest price." *Id.* (emphasis supplied). In making this determination, the producer must refer to the sales contract for the well in question; it is that contract, not the NGPA, which "yields" a sales price for this gas. The NGPA simply assures the producer that *when* a well is qualified in the category which "yields the highest price" to "him," that category "shall be applicable" under section 101(b)(5). *Id.*

Further support for this principle comes from the most determinative piece of legislative history pertaining to the NGPA, the joint House-Senate Conference Committee Report.[19] The Conference Report considered the question of dual-qualification in the context of its discussion on gas subject to existing intrastate contracts with a price in excess of $1.00 per MMBtu. Conf. Rep. at 83. Section 121(a)(3) " 'deregulates' [that] category for ceiling price purposes." *Id.* Nonetheless, section 121(e) provides that any gas that is deregulated "solely by reason" of its qualification in that category and that is sold "at a price established under an indefinite price escalator

[19] *See* Note, *Legislative History of the Natural Gas Policy Act: Title I*, 59 Tex. L. Rev. 101, 115 (1980) ("This report, which detailed the selection and construction of each section of the bill, is the most authoritative evidence of Congress' intent. It is almost as much a part of the NGPA as the bill's text.").

clause" shall be subject to a limitation on the operation of those clauses found in section 105(b)(3), even though "the ceiling prices for such gas are removed pursuant to section 121(a)(3)." Conf. Rep. at 83; 15 U.S.C. § 3331(e).

In discussing these provisions, the Conference Committee directly addressed the question of gas that was dually-qualified as a stripper well *and* an existing intrastate well priced in excess of $1.00 per MMBtu. Conf. Rep. at 83. Would that gas *always* be price-deregulated under section 121(a)(3)? Or could that gas still receive incentive pricing under section 108? The Conference Report squarely indicates that producers could *continue* to price and sell their gas as price-regulated gas under section 108, without any limitation on indefinite price escalators, notwithstanding the "deregulation" of the overlapping intrastate category:

> [N]atural gas qualifying as gas produced from a natural gas stripper well would not be so limited, **if such gas were sold subject to the provisions of sec. 108, rather than taking deregulated treatment as an existing intrastate contract.**

Conf. Rep. at 83 (emphasis supplied).

This Report states that dually-qualified gas *can* be priced and sold in the price-regulated category; section 101(b)(5) does *not* require the price-deregulation of such gas. Indeed, the Conference Committee could not have been clearer in its view that "natural gas qualifying as gas produced from a natural gas stripper well" which also qualifies "as an existing intrastate contract" can be "sold subject to the provisions of sec. 108, rather than taking deregulated treatment." *Id.*[20]

[20] In attempting to distinguish this statement, FERC suggests that it refers to "the overlap of two regulated categories (§ 108, 15 U.S.C. 3318, and § 105(b)(3), 15 U.S.C. 3315(b)(3))." Pet. Br. 38 n.32. This suggestion is mistaken. First, section 105(b)(3) is not a "category" at all, but a limitation on the operation of price escalators in existing intrastate contracts. 15 U.S.C. § 3315(b)(3). Second, the "category" of natural gas covered by "existing intrastate contracts" priced in excess of $1.00 per MMBtu *was* deregulated in section 121(a)(3). *See* Conf. Rep. at 92 ("the agreement '*deregulates*' those categories for ceiling price purposes") (emphasis supplied); Conf. Rep. at 83 ("natural gas which is *deregulated* solely as a result of qualifying as an existing contract") (emphasis supplied). Third, the Conference Report expressly refers to the option of "taking deregulated treatment" on stripper well gas subject to an existing intrastate contract. Conf. Rep. at 83. If the situation really involved an "overlap of two regulated categories" (Pet. Br. 38 n.32), "taking deregulated treatment" would not be an option.

In contrast to these two clear statements, FERC relies on two other statements, one by an individual Senator, which make the obvious point that when gas is qualified in both price-regulated and price-deregulated categories, the deregulated category can become applicable under the proper circumstances. Pet. Br. 37 & n.31.[21] Dually-qualified gas *will* be treated in the price-deregulated category whenever that category "could result in the highest price." 15 U.S.C. § 3311(b)(5). At the time of the NGPA debate in 1978, some congressmen believed that sale prices for price-deregulated gas *would* exceed the sale prices for price-regulated gas by the year 1985. Pet. App. 22a; *see also* 124 Cong. Rec. 38,361 (1978) (Rep. Dingell); 124 Cong. Rec. 31,819 (1978) (Sen. Metzenbaum). Statements on how section 101(b)(5) would operate in those circumstances provide no guidance on its operation in other circumstances.

In sum, the legislative history supports the construction of the court of appeals. Despite an exhaustive re-

[21] The statement of Sen. Bartlett corrected a misunderstanding on whether stripper wells were price-deregulated under section 121. *See* 124 Cong. Rec. 31,387 (1978). The reference from the House "Explanation Statement" simply stated that dual-qualification "would *permit* the producer to obtain stripper well pricing under section 108 prior to January 1, 1985, and deregulation as new gas thereafter." 124 Cong. Rec. 38,364 (1978) (emphasis supplied).

view and discussion of that history, FERC cannot cite a single comment undercutting the court of appeals' construction. In the end, FERC can do no more than claim that "the statements in the legislative history that address the subject of gas that could qualify for two different kinds of treatment point in opposite directions." Pet. Br. 37. Such contradictory statements hardly provide the "clearly expressed legislative intention" necessary to overcome the clear meaning of the statute itself. *INS v. Cardoza-Fonseca*, 107 S. Ct. at 1213 n.12.

2. *The "Broad Purposes" of the NGPA Support Congress' Decision To Treat Dually-Qualified Gas in the Category Which Could Result in the Highest Sale Price.*

Unable to locate any "clearly expressed legislative intention" contrary to the court of appeals' interpretation of section 101(b)(5), FERC invokes the "broad purposes" of the statute. Here, FERC asserts that the "broad purpose" of the statute was to achieve price deregulation and prevent payment of "above-market" prices. Pet. Br. 28-38. This argument is seriously misplaced. First, as this Court recognized in *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74 (1986):

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.

Therefore, even if the "broad purpose" of the NGPA were to deregulate all gas, that "broad purpose" could not override a specific provision to the contrary. *Dimension*, 474 U.S. at 374.

Above all, however, the "broad purpose" of the NGPA was *not* price-deregulation as an end in itself; rather, as this Court has discerned, the "broad purpose" was "to assure adequate supplies of natural gas at fair prices." *Transcontinental*, 474 U.S. at 421. Phased-in, partial deregulation was one *means* of accomplishing this purpose. Incentive pricing for difficult-to-produce gas was another.[22] Even FERC concedes that some of the original incentive categories remain price-regulated to this date, unquestionably permitting regulated incentive prices for single-category gas not qualifying for price-deregulated treatment. 15 U.S.C. §§ 3317(c)(5), 3318.[23]

As a second, closely-related "broad purpose," FERC suggests that Congress wanted to prevent sellers from collecting "above-market" prices for their gas. Pet. Br. 28-38. But the simple fact is that Congress left the matter of gas pricing to private contracts. With respect to regulated gas, the only restriction is that the contract price not exceed the applicable ceiling price; if the seller can succeed in contracting for a price above the "market" but below the ceiling, the NGPA will not interfere. Nor will the NGPA interfere with a contract which sets an "above-market" price for price-deregulated gas. In other words, the potential for "above-market" pricing

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[22] Members of this Court have commented on the economic impact of these incentive prices for difficult-to-produce gas. *See Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409, 436 (1986) (Rehnquist, J., dissenting) ("High-cost gas makes up only a tiny fraction of the aggregate supply of natural gas. *See* Pierce, 68 Va. L. Rev. at 88 n.98 (about 1%). Thus, any increased costs associated with it will tend to be a mere drop in the bucket.").

[23] FERC continues to publish these incentive prices in the Federal Register on a quarterly basis. *See* 53 Fed. Reg. 3,019 (1988).

will *always* exist under the NGPA; even FERC's construction will not eliminate that possibility.[24] Accordingly, FERC cannot rewrite the text of the statute based upon an alleged congressional "intent" to eliminate "above-market" prices.

In view of FERC's own, repeated warnings that the NGPA is not "concerned with the private contract prices at which particular gas is sold" (Pet. Br. 19, 26-27), it is surprising that FERC would even challenge the court of appeals' ruling on the theory that it could lead to "higher-than-market" prices. *See* Pet. Br. 21. Respondents agree with FERC that "Congress clearly sought to set only maximum prices and otherwise to leave the establishment of the prices producers would actually charge to private decision." Pet. Br. 26. Under the terms of the court of appeals' decision, gas buyers and gas sellers will continue to enter into private sales contracts setting different prices for different NGPA categories of gas. These prices may be less than, greater than, or equal to the "market price." Section 101(b)(5) simply provides when gas is qualified in two categories, the category which carries the highest sale price "shall" apply. 15 U.S.C. § 3311(b). This determines the applicable pricing category under the NGPA, but it does not fix or "establish" the price in any way. The actual sales price for all categories, including the highest-priced category, remain subject to "private decision." Pet. Br. 26. Nothing in section 101(b)(5) or the court of appeals' opinion automatically entitles the seller to a "higher-than-market" price.

[24] FERC seems to believe that deregulation will automatically result in the payment of "market prices" for natural gas. *See* Pet. Br. 19, 28-35 ("the deregulated (market) price"). This is incorrect. As the court of appeals recognized, natural gas is often sold under long-term contracts which generally "'contain two clauses—one which sets the price if gas is regulated and one which is implemented if gas is deregulated.'" Pet. App. 16a n.11 (quoting 49 Fed. Reg. at 46,878). Although the clause pertaining to deregulated gas *may* refer to a "market price," it may also refer to a fixed price above or below the "market." *Id.* The NGPA does not require the payment of "market" prices for deregulated gas. *See* 15 U.S.C. § 3311(b)(9).

FERC itself has emphasized this point as recently as this month. *See* Order No. 459-A, 53 Fed. Reg. 3,754, 3,756 (1988). In declining to reduce the regulated incentive price for high-cost gas under section 107(c)(5), FERC stated:

> The Commission notes that high-cost gas prices established pursuant to section 107(c)(5) of the NGPA represent a maximum lawful ceiling price. The Commission does not guarantee that producers can collect these prices. Nor does the Commission require customers to pay this ceiling price. The Commission expects the parties to negotiate an appropriate price for the purchase and sale of high-cost gas in the market. The Commission expects that parties to a contract would renegotiate a "problem contract" if the contract term is no longer market-responsive. The Commission, therefore, expects that the current market will serve to limit incentive prices to competitive levels. Such competitive market forces should be given a chance to operate before any decision is made that regulatory measures are needed to limit incentive prices.

Id. Therefore, while FERC informs this Court that price-regulation leads to above-market pricing (Pet. Br. 31-35), FERC informs the public that that is not necessarily the case.[25]

[25] As FERC recognized, even single-category price-regulated gas may be sold at a price other than the incentive price. Indeed, producers of tight formation gas may desire to sell those gas supplies at prices *below* the regulated incentive prices. The Crude Oil Windfall Profits Tax Act of 1980 permits a producer to obtain tax credits for the production of fuel from non-conventional sources, including tight formations. 26 U.S.C. §§ 29(a), (c) & (e) (Supp. II 1984). However, to receive the tax credit, the gas must be price-regulated and the producer must elect not to receive an incentive price for such gas. 26 U.S.C. §§ 29(c)(2)(B), (e).

3. *Changes in Economic Conditions Do Not Provide FERC with a License To Rewrite the Statute.*

Since FERC cannot show how the court of appeals' holding violates *either* a "clearly expressed legislative intention" or a "broad purpose" of the NGPA, FERC asserts that Congress could not possibly have foreseen the future operation of section 101(b)(5). Pet. Br. 28-38. According to FERC, Congress in 1978 failed to foresee the potential for low market prices in 1985, and hence could not have anticipated that contract pricing provisions "could result" in a higher price for price-regulated than price-deregulated gas under the terms of section 101(b)(5). *Id.*

This argument is factually incorrect. The very purpose of *phased-in* price-deregulation was to wait until the producers had discovered sufficient supplies of "new" gas to hold the market prices down. *See, e.g.*, 124 Cong. Rec. 28,879 (1978) (Sen. Melcher) ("Under the terms of this, getting above \$2.00, which it will in 1979 for new gas, it could probably bring in a lot more gas than we could envision at this time. So we might reach the point of additional supply."); 124 Cong. Rec. 31,845 (1978) (Sen. Glenn) ("[T]his legislation keeps the lid on prices during that period until production increases sufficiently to a point where there is enough supply that competition will effectively hold prices down."). Congress clearly understood the possibilities and enacted section 101(b)(5) in full view of those possibilities.

Yet even if section 101(b)(5) did generate an unexpected result in today's economic climate, that would authorize neither FERC nor the Court to rewrite the statute: "It is not for us to speculate, much less act, on whether Congress would have altered its stance had the specific events of this case been anticipated." *TVA v. Hill*, 437 U.S. at 185. "[T]he fact that Congress might have acted with greater clarity or foresight does not give courts a *carte blanche* to redraft statutes in an effort to

achieve that which Congress is perceived to have failed to do." *United States v. Locke*, 471 U.S. 84, 95 (1985). Accordingly, a court may not "attempt to soften the clear import of Congress' chosen words whenever a court believes those words lead to a harsh result." *Id.* "If the [statute] falls short . . . that is a problem for Congress, and not the [agency] or the courts, to address." *Dimension*, 474 U.S. at 374.

In attempting to rewrite the statute, FERC is reasserting the positions condemned by this Court in *Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983). In that case, FERC had issued orders which effectively prevented the interstate pipelines from receiving incentive prices on gas produced from their own wells. *Id.* at 322-24. FERC defended these orders with many of the same arguments it advances here, contending that they were necessary to prevent unfairness to the consumer, to preclude an "unintended windfall" to the pipeline-producer, and to fulfill the "implicit" intentions of Congress. *Id.* at 339, 341. In rejecting these arguments, this Court recognized that the NGPA established a "comprehensive regulatory scheme," 463 U.S. at 339, and that "[g]iven such a comprehensive scheme, we conclude that Congress would have clearly identified, either in the statutory language or in the legislative history, any significant source of production that was intended to be excluded" from incentive pricing. *Id.* at 336. "Yet nowhere in the NGPA do we find any expression of a desire to exclude pipeline production." *Id.* at 337.

This same principle applies in this case. Given the "comprehensive regulatory scheme" of the NGPA, Congress clearly would have said if it wanted all dually-qualified regulated-deregulated gas to be treated in the price-deregulated category. Congress did not say that. Instead, Congress said that the category "which could result in the highest price shall be applicable." 15 U.S.C. § 3311(b)(5).

C. Because Congress Has Manifested Its Intent in Section 101(b)(5), the Court Should Not Defer to a Contrary Interpretation of the Agency.

As a final point in its brief, FERC suggests that its construction of the statute, even if "less than crystal clear" (Pet. Br. 39), is nonetheless entitled to "deference" (Pet. Br. 39-40). This suggestion is misplaced. As this Court has recognized, "'[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.'" *INS v. Cardoza-Fonseca*, 107 S. Ct. at 1221 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). This rule applies notwithstanding any tradition of "deference" to agency interpretations. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. "The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Dimension*, 474 U.S. at 368.

In this case, "traditional tools of statutory construction" clearly and unambiguously reveal that Congress intended for gas qualified in both price-regulated and price-deregulated categories to be treated in the category which results in the highest sale price. 15 U.S.C. § 3311 (b)(5). Accordingly, that must be "the end of the matter" for both the agency and the Court. If FERC believes that these clearly-expressed legislative intentions are inappropriate, it should revisit the issue with Congress. Gas consumers and gas producers could then debate not just section 101(b)(5), but the entire NGPA compromise. Elected representatives would then have the opportunity to remake the law. In sum, "[i]f that provision is to be changed, it should be by Congress and not by this Court." *United States v. James*, 106 S. Ct. at 3125.

D. Section 121 Does Not Override or Nullify the Meaning of Section 101(b)(5).

In attempting to avoid the clear impact of section 101(b)(5), petitioners in No. 87-364 argue that that section does not apply to dually-qualified regulated-deregulated gas. Br. 10-11. Instead, these petitioners contend that section 121 controls the situation, requiring price-deregulation for any gas qualified in one of the listed categories even if it also qualifies in a category that remains price-regulated. Br. 10-11. Petitioners assert that section 121 is "not ambiguous" in this regard. *Id.*

This argument is untenable. On its face, section 101(b)(5) expressly refers to "sales qualifying under more than one provision," including provisions providing for "any maximum lawful price" and provisions providing for "any exemption from such a price." 15 U.S.C. § 3311(b)(5). Reference to other portions of the NGPA removes any doubt that the "provisions" providing for "any exemption from such a price" are the price-deregulation provisions of section 121. In section 101(b)(9), for example, Congress expressly stated that the provisions providing for an "exemption from such a maximum lawful price" are the provisions of "part B of this subchapter," *i.e.*, those in section 121. 15 U.S.C. § 3311 (b)(9). "There is a presumption that the same words used twice in the same act have the same meaning." 2A C. Sands, *Sutherland Statutory Construction* § 46.06 (4th rev. ed. 1984). Accordingly, section 101(b)(5) expressly applies to gas qualified in both a price-regulated category under part A and a price-deregulated category under part B.

FERC, the only petitioner claiming the right to deference in this case, interprets section 101(b)(5) to apply to dually-qualified regulated-deregulated gas. *See, e.g.*, Interim Rule Covering High-Cost Gas Produced from Tight Formations, 45 Fed. Reg. 13,414, 13,422-23

(1980) ("Under section 101(b)(5), gas qualifying under one or more categories receives the highest maximum lawful price for which it is eligible including a deregulated price, if applicable."). FERC does "not renew" any argument to the contrary at this time. Pet. Br. 21 n.20. Therefore, the petitioners in No. 87-364 are advancing an argument that has met rejection not only from the respondents, but from FERC and the court of appeals as well.

In contrast to the clear and express applicability of section 101(b)(5), section 121 is totally silent on the issue of dually-qualified gas. That section extends price deregulation only to the "specifically enumerated" categories. Conf. Rep. at 92. In providing for the price deregulation of "a number of categories," *Mid-Louisiana*, 463 U.S. at 336 n.14, section 121 says nothing about gas which is qualified both in those categories and in the price-regulated categories. In view of this silence, and in view of the direct applicability of section 101(b)(5), it is clear that section 121 does not "mandate" the deregulation of dually-qualified gas.

E. The Court of Appeals Correctly Concluded That FERC Has No Authority To "Automatically" or "Implicitly" Qualify New Tight Formation Gas as New Gas Under Section 102(c) or 103.

In addition to its attempt to deregulate all dually-qualified gas, FERC has also attempted to insure that the maximum volume of gas becomes dually-qualified in both a price-regulated and a price-deregulated category. Therefore, FERC has announced that any well qualified in a price-regulated category as "new tight formation gas" under section 107(c)(5) also "automatically" and "implicitly" qualifies in a second, price-deregulated category as "new natural gas" under section 102 or "new, onshore production" gas under section 103. Pet. App. 81a-82a, 114a-115a. This determination has significance

in conjunction with FERC's mandated price-deregulation of dually-qualified gas; if dually-qualified gas were not price-deregulated, then FERC would have a lesser interest in dual-qualification. Nonetheless, its "implicit" determination of a dual-qualification still could not stand.

Section 503 of the NGPA expressly states that "[a] Federal or State agency having regulatory jurisdiction with respect to the production of natural gas is authorized to make determinations referred to in subsection (a)," including determinations with respect to "new natural gas" under section 102, "new, onshore production wells" under section 103 and "high-cost natural gas" under section 107(c). 15 U.S.C. §§ 3312, 3313, 3317(c), 3413(c)(1). Only "[i]f such agency executes [a] waiver" can FERC "make the determinations which would otherwise be made by such Federal or State agency." 15 U.S.C. § 3413(c)(2)(A). "Unless the jurisdictional agency waives its role, in writing, it is to make the initial determination of whether specific gas satisfies the factual criteria for a particular category of incentive-priced gas." *Williston Basin Interstate Pipeline Co. v. FERC*, 816 F.2d 777, 780 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 748 (1988).

The legislative history of the NGPA is replete with evidence that section 503 means what it says: natural gas category determinations are made by state and federal jurisdictional agencies upon application from the producer. *See, e.g.*, Conf. Rep. at 74, 118; 124 Cong. Rec. 38,363-64 (1978) (Explanation Statement); 124 Cong. Rec. 17,481 (1978) (Sen. Domenici). In the absence of a properly-executed waiver, FERC would have no authority to make such a determination *even if* the producer presented FERC with an application. Clearly, FERC has no authority to make those determinations in the absence of an application.

The Conference Report leaves no room for debate on this matter:

> [T]here is no intention to allow the Commission to "second guess" the agency by independently weighing the evidence and reversing the agency's determination as if the initial responsibility to make the determination were placed within the Commission.

Conf. Rep. at 118.

"The Federal Government will *not* be allowed to establish a separate bureaucracy for making the determinations required by this law." 124 Cong. Rec. 17,481 (1978) (Sen. Domenici) (emphasis supplied). "If a seller wishes to change the category under which production from a given well qualifies, he must apply to the appropriate State or Federal agency with authority to make determinations under section 503." Conf. Rep. at 74.

Even *these* agencies have no authority to act without an application. Therefore, while "a producer may claim or apply for the highest price to which he is entitled," there is no "duty to compel a State or Federal agency to search through the various price classifications under the act and find the highest permissible price." 124 Cong. Rec. 29,109 (1978) (Sen. Jackson). "It is up to the producer to apply for whatever designation he determines is most likely to be of greatest benefit to him." 124 Cong. Rec. 38,363-64 (1978) (Explanation Statement).

FERC cannot seriously contend that it would have the authority to issue an unsolicited "determination" that a particular well qualified under section 102(c) or 103. Nor can FERC contend that it would have the authority to issue an unsolicited "determination" that a particular well qualified under section 107(c)(5). Nonetheless, FERC purports to have the authority under its "broad" rulemaking powers to issue unsolicited "determinations" that most new tight formation wells under section 107(c)(5) are also qualified under section 102 or 103. Pet. Br. 41.

FERC has tried this once before. In *Williston Basin*, FERC claimed that it had made "case-by-case 'tight formation' determinations not through the procedures of section 503 but rather through somewhat different procedures of its own devising, for which it claimed authority in its broad rulemaking powers under section 501 of the NGPA." 816 F.2d at 781 (footnotes omitted). The United States Court of Appeals for the District of Columbia Circuit rejected this approach, holding that "[t]he parties' contention that FERC may avoid the specific procedures of section 503 by relying instead on its general rulemaking authority under section 501 renders section 503 nothing more than a mere suggestion from Congress for FERC to take or not as it likes." *Williston Basin*, 816 F.2d at 782-83. "Congress clearly intended that these designations would be made through the procedural scheme it enacted for that specific purpose, and section 503 was that scheme." *Id.* at 783.

This Court should reach the same result. FERC does not have authority to make *any* unsolicited well category determinations, regardless of whether those determinations are "implicit," "automatic" or based upon earlier jurisdictional agency determinations. The NGPA does not provide for "implicit" or "automatic" determinations. Pet. Br. 18a-19a. Congress gave FERC considerable authority under the NGPA, including the authority to define the requirements of new tight formation gas, but Congress did not give FERC the authority to make well category determinations. Conf. Rep. at 118.[26] Con-

[26] Near the end of its brief, FERC defends its "implicit" well category determinations on the theory that they are "in all relevant respects identical" to a redefinition of new tight formation gas. Pet. Br. 42. But the fact that FERC may have been able to achieve the same result through lawful means does not excuse its choice of an unlawful means. *Compare Singer v. Wadman*, 745 F.2d 606, 609 (10th Cir. 1984) (unlawful to commit "a lawful act by unlawful means"), *cert. denied*, 470 U.S. 1028 (1985).

gress gave that authority to state and federal jurisdictional agencies. 15 U.S.C. § 3413.

This Court has long recognized that an agency cannot exceed the scope of authority delegated by Congress, whether by regulation or administrative interpretation.[27] And just as an agency cannot exceed its granted jurisdiction, an agency also cannot use the "power to issue regulations" to "extend a statute or modify its provisions." *Campbell v. Galeno Chemical Co.*, 281 U.S. 599, 610 (1930). Clearly, an agency cannot "bootstrap itself into an area in which it has no jurisdiction." *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973). Agency "rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute." *Dimension*, 474 U.S. at 374.

In this case, FERC has used its rulemaking powers to extend the bounds of its authority. FERC has "implicitly" and "automatically" made the well category determinations that Congress has entrusted to others. The court of appeals properly rejected this inappropriate exercise of rulemaking power.

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[27] *See, e.g., Peters v. Hobby*, 349 U.S. 331, 345 (1955); *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944); *International Ry. v. Davidson*, 257 U.S. 506, 514-15 (1922); *United States v. Wickersham*, 201 U.S. 390, 398 (1906); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Nos. 87-363 and 87-364

In the Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

PUBLIC SERVICE COMMISSION OF NEW YORK, ET AL., PETITIONERS

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-363

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

No. 87-364

PUBLIC SERVICE COMMISSION OF NEW YORK, ET AL.,
PETITIONERS

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION

In our opening brief, we argued that the Commission correctly construed NGPA Section 101(b)(5), 15 U.S.C. 3311(b)(5), to provide that, when gas is qualified under more than one NGPA pricing provision, the applicable provision is the one that establishes the highest ceiling price—so that, in particular, if one provision declares that there is no legal ceiling, that provision applies and the gas is price-deregulated. We showed that this construction is required by the language of Section 101(b)(5) and by the NGPA's general approach to price regulation, both of

which focus on legal ceilings and not on particular producers' contract prices, and is the only construction consistent with the overall congressional plan of phased-in deregulation and with the terms of the debate that led to enactment of the NGPA. We also showed that the court of appeals' and the producer respondents' contrary construction, which grants each producer of dual-qualified gas the right to avail itself at any particular time of whichever provision results in the highest price under its particular contracts, is incompatible with the statutory text, structure, and history. Nothing in the producer respondents' brief, which ignores large parts of our analysis, casts any doubt on the correctness of the Commission's conclusion, and only a few of respondents' arguments warrant a reply.[1]

1. Respondents attempt a plain-language argument (Br. 21-26), but instead of carefully examining the words of Section 101(b)(5), they offer only general rules of statutory construction and repetition of the statutory text. The section states that, when a quantity of gas qualifies under more than one provision, "the provision which could result in the highest price shall be applicable." Respondents make no plausible effort to account for the fact that Section 101(b)(5) selects the provision that "could result" in the highest price, an expression that on its face refers to a legal ceiling, not the provision that "results" or "actually results" or "will result" in the highest price under a particular contract at a particular time. Respondents ignore the fact (see Gov't Br. 23-24) that nothing in the language makes any reference to particular producers or their contracts or suggests that two producers whose gas

[1] We hereafter refer simply to "respondents" in speaking of the producer respondents, Martin Exploration Management Co., et al.

falls within the same overlap of pricing provisions could receive different treatment for that gas depending on what prices each agreed to in its contracts. And respondents make no attempt to show how a reading of Section 101(b)(5) under which the applicable ceiling is determined by first examining particular contract prices would accord with the overall approach taken by the NGPA's wellhead pricing provisions, which focus on ceiling prices only and otherwise leave contract prices wholly to private decision (see Gov't Br. 25-27).

Respondents make, at bottom, only two arguments on the statutory language. First, they appear to suggest (Br. 23) that the reason Congress used "could result" rather than "results" or "actually results" or "will result" is that, since NGPA provisions do not *dictate* prices, it would be improper usage to employ one of those alternative locutions. But respondents' own brief in opposition, at the petition stage in this case, repeatedly used those very locutions (Br. in Opp. 8, 11, 14, 16) when *they* wanted to convey the idea of comparing provisions to see which leads to the highest price at a particular time under particular contracts. Congress could have done the same thing, but it chose the words "could result" because it wanted a comparison of NGPA provisions, not of the prices called for by particular contracts.

Respondents also argue that Congress would not have chosen the language it did "if it wished to reach the same result – price-deregulation – in every case" (Br. 23). But respondents mysteriously ignore the fact that Section 101(b)(5) also governs the choice between two or more *regulated* categories in which a particular quantity of gas qualifies. See Gov't Br. 23-25. The language Congress used in Section 101(b)(5) is an economical and altogether natural way to cover all category comparisons in a single

sentence; indeed, it is not easy to think of a more compact (or clearer) way to accomplish the task.[2]

2. a. Respondents' analysis of congressional intent (Br. 26-33) makes no attempt to respond to our showing (Gov't Br. 28-31) that their proposed construction of Section 101(b)(5), which would allow a producer to opt back into regulation whenever it could obtain a regulated price higher than the price it would obtain if the gas were deregulated, is incompatible with the compromise plan for the future of natural gas pricing that Congress put into effect in the NGPA. As the statute's structure and legislative history make clear, the NGPA creates a scheme of "phased deregulation," and there is no indication that Congress contemplated a return of deregulated gas to regulated status except through the carefully limited mechanism of Section 122, 15 U.S.C. 3332 (now-expired authority for one-time, temporary presidential or congressional reimposition of price controls). Respondents do not merely ignore that plan in construing Section 101(b)(5). They suggest (Resp. Br. 6-9, 20-21 & n.11) that the NGPA's provisions may be neatly divided into those which are pro-producer and those which are pro-consumer, and that

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[2] Respondents suggest (Br. 22 n.12) a rewriting of Section 101(b)(5) that they believe reflects the Commission's reading of the provision, but that rewriting betrays respondents' misunderstanding both of Section 101(b)(5) and of the Commission's reading. Under respondents' rewriting, regulated-regulated gas would " 'be treated under the provision which sets the highest price' " (Resp. Br. 22 n.12). But the pricing provisions of the NGPA do not "set[]" prices; they establish only upper limits, if any, on the prices that producers and their customers may set by contract. Accordingly, a "competent draftsman" (*id.* at 23) who wished, as we think Congress did, to provide for a comparison of "maximum lawful prices" would not make applicable " 'the provision which sets the highest price' " (*id.* at 22 n.12). Such a draftsman, we think, would make applicable the provision that "could result in the highest price."

Section 101(b)(5) must be read as clearly in the former group, thus allowing its construction in isolation from the structure and aims of the NGPA as a whole.

Respondents also offer no answer at all to our argument (Gov't Br. 31-35) that their construction of Section 101(b)(5) would treat producers in a manner wholly outside the terms of the debate that led to the NGPA's enactment and far more favorably than anyone in Congress contemplated. The NGPA reflects the "Conference Committee's careful reconciliation of two strong, but divergent, responses to the natural gas shortage" (*Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 331 (1983)), one favoring rapid deregulation, the other the extension of regulatory controls into intrastate markets. It would be inconsistent with both of those responses to give producers a legal tool for securing higher prices for gas eligible for deregulation than they could obtain in the unregulated market. As Senator Jackson, the Senate floor manager, made clear (124 Cong. Rec. 28633 (1978)), deregulation was the "maximum economic incentive" that anyone in Congress contemplated.[3]

b. Ignoring the import of the statutory structure and of the legislative history taken as a whole, respondents focus (Br. 26-28) on two particular statements in the leg-

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[3] Contrary to respondents' misinterpretation (Br. 30-33), we do not suggest that there is some single "market price" applicable to all producers, above which the NGPA forbids producers to sell. A "market price," of course, is the price a particular producer can obtain in the market from a particular purchaser at a particular moment, and there could conceivably be as many market prices as there are producer-purchaser transactions. The point is that Congress did not intend to give producers a mechanism for obtaining a higher price than they could obtain in the market, once the dates set by the NGPA for deregulation arrived.

islative history. As we explained in our opening brief (at 36-38), however, even aside from the existence of statements in the legislative history that point in the opposite direction (see Pet. App. 21a n.15), the statements respondents rely on cannot possibly overcome the arguments supporting the Commission's construction of Section 101(b)(5).

The first statement—by key House conferees led by Representative Dingell (124 Cong. Rec. 38363-38364 (1978)), who was in what respondents would term the "pro-consumer" group of legislators (Resp. Br. 21 n.11)—was indeed offered in explanation of Section 101(b)(5). But, as we have explained (Gov't Br. 37-38), the statement was addressed to a different problem from that presented in these cases: the process by which producers qualify gas in particular categories, not (as here) the selection among multiple categories in which gas has already been qualified. The statement simply assured other legislators that the process of obtaining category-qualifications from state and federal jurisdictional agencies under Section 503, 15 U.S.C. 3413, which relies at least in general on producer initiative, would not be displaced by Section 101(b)(5)—that is, that Section 101(b)(5) did not mean that the jurisdictional agencies would have the substantial burden of determining sua sponte all of the provisions under which particular gas might be qualified.

The second statement relied on by respondents, which appears in the Conference Report (H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. 83 (1978)), was not made as an explanation of Section 101(b)(5) at all, so it could be of little weight in determining the proper construction of that provision. As we explained in our opening brief (at 38 n.32), the statement is an explanation of the singular and

complex pricing requirements of Sections 105(b)(3) and 121(e), 15 U.S.C. 3315(b)(3), 3331(e), covering certain gas sold under existing (or successor) intrastate contracts subject to "indefinite price escalator clauses."[4] Properly understood, the conference committee statement does not offer respondents any support.

Gas sold under existing (or successor or rollover) intrastate contracts at a price in excess of $1 (per million British thermal units) is generally deregulated by Section 121(a)(3), 15 U.S.C. 3331(a)(3), effective January 1, 1985. Section 121(e), however, calls off that price deregulation for a subcategory of such gas: if the price is established by an indefinite price escalator clause, and if the gas would not in any event be deregulated under a subsection of Section 121 other than subsection (a)(3), then Section 105(b)(3) applies. Subsection (A) of that provision, in turn, places a ceiling on price escalation for such gas, and subsection (D) then states that that ceiling does not apply to gas (as Section 121(e) already makes clear) that falls into other categories deregulated by Section 121 (gas under Sections 102, 103, 107(c)(1)-(4), 15 U.S.C. 3312, 3313, 3317(c)(1)-(4)) or to gas that falls into the still-regulated categories of high-cost and stripper-well gas defined by Sections 107(c)(5) and 108, 15 U.S.C. 3317(c)(5), 3318,

[4] An indefinite price escalator clause is defined in Section 105(b)(3)(B), 15 U.S.C. 3315(b)(3)(B), as any provision of any contract—

> (i) which provides for the establishment or adjustment of the price for natural gas delivered under such contract by reference to other prices for natural gas, for crude oil, or for refined petroleum products; or
>
> (ii) which allows for the establishment or adjustment of the price of natural gas delivered under such contract by negotiation between the parties.

and that is therefore subject to other (in fact, higher) ceilings. In short, a portion of the intrastate gas that would be deregulated by Section 121(a)(3) is brought back under regulation to limit the effect of indefinite price escalator clauses.

The Conference Report (H.R. Conf. Rep. 95-1752, *supra*, at 83) explains the workings of those complex pricing provisions, stating:

> [N]atural gas which is deregulated as a result of being new gas under sec. 121(a)(1), gas from deregulated new, onshore production wells under sec. 121(a)(2) or 121(c), or high cost natural gas under sec. 121(b), would not be subject to this limitation [Section 105(b)(3)], even if it were sold under an existing intrastate contract. Furthermore, natural gas qualifying as gas produced from a natural gas stripper well would not be so limited, if such gas were sold subject to the provisions of sec. 108, rather than taking deregulated treatment as an existing intrastate contract.

Respondents seize on the last sentence of that explanation, concerning Section 108 gas, and, without reference to the context or the underlying statutory provisions it explains, claim that Congress here stated that dual-qualified regulated-deregulated gas could take regulated treatment at the producer's option (Resp. Br. 27-28). But even aside from whether Congress's understanding of Section 101(b)(5) can be inferred from this single statement, which is buried in a long explanation of complex, interrelated provisions other than Section 101(b)(5) itself, the statement does not indicate what respondents suggest.

First, the statement is not in fact addressed to gas that falls into two categories, one with a price cap, the other not. The statement concerns the overlap of gas covered by

Section 108 and gas covered by Section 105(b)(3)(A)—both of which are subject to statutory ceilings. The conference committee admittedly referred to gas taking "deregulated treatment," but that usage cannot change the fact that the statement applies only to gas that falls under two provisions that impose price ceilings. Even respondents recognize the peculiarity of the committee's usage: they properly use quotation marks in their own reference to "the 'deregulation' of the overlapping intrastate category" (Br. 28). The committee's usage, which the Commission (Pet. App. 117a) and the court of appeals (*id.* at 25a) followed, is due to the complex structure of Section 121, under which the intrastate gas at issue is "deregulated" by Section 121(a)(3), only to be brought back under a price control in certain circumstances by Sections 121(e) and 105(b)(3).

Second, although the particular sentence relied on by respondents does not address gas qualified for both a category subject to price caps and a category that is not, the provisions that are explained in the cited portions of the Conference Report do. And what those provisions say confirms the Commission's view that regulated-deregulated gas should be treated as deregulated. In each case of the overlap of a category of gas subject to a price ceiling (*i.e.*, the Section 105(b)(3)(A) price ceiling) with a category in which all price ceilings are removed, Sections 105(b)(3)(D) and 121(e) specifically provide that the latter category governs.

3. On the second question presented in these cases, respondents argue (Br. 38-42) that the Commission has overstepped its authority and interfered with the process of qualifying gas in particular categories. But the Commission has not issued any determinations of the qualification of particular gas or provided for the bypassing of the Section 503 procedures. Compare *Williston Basin Inter-*

state Pipeline Co. v. *FERC,* 816 F.2d 777, 781-782 (D.C. Cir. 1987), cert. denied, No. 87-502 (Jan. 19, 1988). Rather, as we explained in our opening brief (at 40-43), the Commission has merely insisted by rule that jurisdictional agencies implement the concededly valid definition of a certain category of "new tight formation" gas under Section 107(c)(5) that it is unquestionably within the Commission's power to define: since such gas "is" Section 102 or 103 gas, by definition, it must be given that label when it is given the Section 107(c)(5) label.[5]

This was an entirely reasonable exercise of the Commission's regulatory powers under Sections 501 and 503(a)(2), 15 U.S.C. 3411, 3413(a)(2), and of the special power to develop the Section 107(c)(5) pricing scheme, which Congress expressly committed "to the expertise and judgment of FERC" (*Pennzoil Co.* v. *FERC,* 671 F.2d 119, 123 (5th Cir. 1982)). Indeed, in providing for deregulated treatment under Section 102 or 103 of certain new tight formation gas, the Commission has furthered Congress's intent to reserve Section 107(c)(5) incentive pricing for those situations where it is "needed in order to make high-cost

[5] Indeed, in order to be new natural gas ("as defined in section 102(c)"), and hence come within the definition of new tight formation gas under Section 107(c)(5) (see 18 C.F.R. 271.703(b)), the gas must, by virtue of Section 102(c) itself, be "determined in accordance with section 503" to meet Section 102(c)'s requirements. For such gas, the statute thus expressly states what the Commission here reaffirmed by rule: a new tight formation determination cannot be issued without issuance of the implicit Section 102(c) determination. Section 103 contains the same "determined in accordance with section 503" language, but it does not appear in the definitional subsection (c) referred to in the Commission's regulation defining new tight formation gas. So trivial a difference, however, cannot render the Commission's Section 107(c)(5) ruling valid for Section 102 gas and not valid for Section 103 gas.

gas worth exploiting" (*Williston Basin Interstate Pipeline Co.,* 816 F.2d at 779). In any event, the court of appeals on rehearing (Pet. App. 30a) recognized "FERC's continuing authority to modify the criteria that establish which types of gas qualify under § 107(c)(5)." What the Commission has done is no different from such a modification (Gov't Br. 42).

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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MARCH 1988

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Nos. 87-363 and 87-364

In The
Supreme Court of the United States
October Term, 1987

Federal Energy Regulatory Commission, *et al.*,
Petitioners,
v.
Martin Exploration Management Company, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF WILLIAMS NATURAL GAS COMPANY FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Nos. 87-363 and 87-364

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Petitioners,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MOTION OF WILLIAMS NATURAL GAS COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 36.3 of this Court's rules, Williams Natural Gas Company (WNG) hereby moves for leave to file the attached brief as *amicus curiae* in support of the petitioners urging reversal of *Martin Exploration Management Co.* v. *FERC*, 813 F.2d 1059 (10th Cir. 1987). The necessity for this motion arises because WNG was unable to obtain the written consent of all parties to participate fully in this case as *amicus curiae.* WNG did, however, receive written consent to participate fully as *amicus curiae* from many of the key parties, including

the Federal Energy Regulatory Commission, all of the other petitioners, Shell Offshore, Inc. and Shell Western E & P Inc., and Martin Exploration Management Co.[1]

1. As explained more fully in the enclosed brief, WNG, which owns and operates a major interstate natural gas pipeline system, possesses a clear and direct interest in this case. In particular, WNG purchases natural gas under 1100 contracts for resale to direct industrial customers and gas distribution companies. The cost of a substantial portion of that gas will be directly affected by the outcome of this proceeding. WNG estimates that the Tenth Circuit's decision, if upheld, may cause WNG, its customers and ultimate consumers over $100 million in additional costs for past purchases and over $50 million in additional purchased gas costs for each future year. The magnitude of these amounts are such that WNG and its customers may face greater harm as a result of the Tenth Circuit's decision than any other interstate natural gas pipeline company.

2. Further, WNG's interest in this proceeding has been previously recognized by both the Tenth Circuit and this Court. The Tenth Circuit, for example, granted WNG's motion for leave to submit a brief as *amicus curiae* in support of the requests for rehearing of its March 9, 1987 decision in this case. By letter dated November 30, 1987, this Court similarly granted WNG's motion for leave to submit a brief as *amicus curiae* in No. 87-363 in support of the petitions for a writ of certiorari. Given this significant interest, WNG submits that it is necessary that it be allowed to submit the attached brief. Indeed, acceptance of this brief will help assure that the Court is fully apprised of all aspects of the issues in this case, particularly since WNG's arguments may differ in some respects from the arguments that will be raised by other parties.

[1] These written consent forms were submitted to the Court on September 21, 1987.

WHEREFORE, WNG respectfully requests the Court to grant this motion and to accept and consider its attached brief as *amicus curiae* in support of the petitioners in this case.

Respectfully submitted,

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IN THE

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR WILLIAMS NATURAL GAS COMPANY AS AMICUS CURIAE

Pursuant to Rule 36 of this Court's rules, Williams Natural Gas Company (WNG) submits its brief as *amicus curiae* in support of the petitioners in Nos. 87-363 and 87-364. In this brief, WNG will demonstrate that the Tenth Circuit committed clear legal errors in reversing the Federal Energy Regulatory Commission's (Commission) interpretation of Title I of the Natural Gas Policy Act (NGPA).[1]

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[1] The Tenth Circuit's decision in Martin Exploration Management Co. v. FERC, 813 F.2d 1059 (1987) is set forth in the Ap-

INTEREST OF WILLIAMS NATURAL GAS COMPANY

WNG possesses a clear and direct interest in this case. WNG owns and operates a major interstate natural gas pipeline system under various certificates of public convenience and necessity issued by the Federal Power Commission (FPC) or its successor, the Commission. WNG purchases gas under approximately 1100 gas purchase contracts and then transports and resells this gas primarily in Kansas and Missouri to distribution companies or to industrial customers served directly from its system. The distribution companies, in turn, resell this gas to approximately 2,900,000 ultimate consumers.

WNG purchases substantial amounts of gas dually qualified under both deregulated (*e.g.*, NGPA §§ 102(c) and 103(c))[2] and regulated (*e.g.*, NGPA § 107(c)(5))[3] NGPA categories. Under Order No. 406, WNG was able to reduce the price of much of its dually qualified gas to measurably lower market oriented prices. The Tenth Circuit's reversal of Order No. 406, however, if upheld, will result in substantially higher prices for dually qualified gas. WNG estimates that such higher prices may cause WNG, its customers and the ultimate consumers increased costs totalling over $100 million for past purchases and over $50 million in additional purchased gas costs for each future year.

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pendix at 1a-33a. The Commission's rulemaking orders (Order Nos. 406 and 406-A), which are before this Court, are set forth in the Appendix at 61a-131a.

[2] 15 U.S.C. § 3312(c), covering "new" natural gas from new reservoirs, certain new OCS leases, or new wells drilled a certain distance from existing "marker" wells. 15 U.S.C. § 3313(c), covering "New onshore production wells."

[3] 15 U.S.C. § 3317(c)(5), covering gas that involved high cost production which the Commission found to present extraordinary risks or costs, and therefore provided higher ceiling prices.

STATUTORY BACKGROUND

In enacting the NGPA, "Congress comprehensively and dramatically changed the method of pricing natural gas produced in the United States." *Public Service Commission of State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 322 (1983). In order to effect this change, Congress in Title I of the NGPA established "an exhaustive categorization of natural gas production." *Id.* at 332. Under this categorization, Congress immediately deregulated gas in a number of categories,[4] provided for phased deregulation of gas in other categories,[5] and provided for permanent regulation of the remaining natural gas categories.[6] The issue in this case arises because some natural gas has qualified in two categories, one regulated and the other deregulated.

SUMMARY OF ARGUMENT

The only issue in this case involves the treatment of natural gas which is dually qualified under regulated and deregulated NGPA categories. In a rulemaking, Order No. 406, the Commission found that NGPA Section 121 required deregulation of such dually qualified natural gas. The Tenth Circuit, in contrast, found that NGPA Section 121 was ambiguous but that NGPA Section 101(b)(5) places in the hands of natural gas producers the right to choose whether their gas should be regulated or deregulated.

The Commission's interpretation was a reasonable one and, thus, should be accepted, particularly in view of the very substantial deference due Commission interpreta-

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[4] *See e.g.*, NGPA Sections 107(c)(1)-(4) (15 U.S.C. § 3317(c)(1)-(4)).

[5] *See e.g.*, NGPA Sections 102(c) (15 U.S.C. § 3312(c)) and 103 (15 U.S.C. § 3313).

[6] *See e.g.*, NGPA Sections 104 (15 U.S.C. § 3314), 107(c)(5) (15 U.S.C. § 3317(c)(5), and 108 (15 U.S.C. § 3318).

tions of the NGPA, a statute which it has been entrusted to administer. The Commission based its interpretation primarily on NGPA Section 121. The plain and unambiguous language of that provision mandates deregulation of the dually qualified gas at issue here. Indeed, any contrary interpretation, would by implication add an additional exception for dually qualified gas to the two expressly stated exceptions contained in Section 121. The Court has previously found similar exceptions by implication to be improper. The reasonableness of the Commission's interpretation of Section 121 is also supported by the underlying legislative history of the NGPA.

The Tenth Circuit reversed the Commission based primarily on its reading of NGPA Section 101(b)(5). The Tenth Circuit's interpretation of Section 101(b)(5), however, produces certain anomalous results which clearly show the unreasonableness of such an interpretation. Further, the Commission interpreted Section 101(b)(5) as being consistent with the deregulation of dually qualified natural gas. Since that interpretation was based on a reading of the statutory language in its ordinary, everyday sense, and that reading was a reasonable one, the Commission's interpretation of Section 101(b)(5), and not the Tenth Circuit's interpretation, should be accepted by the Court.

Finally, if this Court were to affirm the Tenth Circuit's decision, the resulting reversal of the Commission's rule should be on a prospective-only basis. Under the *Chevron Oil* standards, such prospective-only treatment is clearly warranted. Absent such prospective-only treatment, natural gas pipelines, their customers, and ultimate consumers will suffer very substantial harm.

ARGUMENT

I. THE TENTH CIRCUIT CLEARLY ERRED IN REVERSING THE COMMISSION'S FINDING THAT THE NGPA MANDATES DEREGULATION OF NATURAL GAS DUALLY QUALIFIED IN BOTH REGULATED AND DEREGULATED CATEGORIES

There can be no doubt that the Commission's interpretation of the NGPA is entitled to substantial deference. As the Court stated in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 844 (1984): "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." *Accord Aluminum Co. of America* v. *Central Lincoln Peoples' Utility Dist.*, 467 U.S. 380, 385 (1984); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), *quoting Power Reactor Development Co.* v. *International Union of Electric, Radio and Machine Workers*, 367 U.S. 396, 408 (1961). Thus, the Commission's interpretation of the NGPA can only be overturned if " 'there are compelling indications that it is wrong.' " *E.I. duPont de Nemours and Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), *quoting Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

Further, in view of the very substantial deference due the Commission, this Court " 'need not find that [its] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' " *Aluminum Co. of America* v. *Central Lincoln People's Utility Dist.*, 467 U.S. at 389, *quoting American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, 461 U.S. 402, 422-23 (1983) (insertion in original). The Court " 'need only conclude that it is *a* reasonable intepretation of the relevant provisions.' " *Id.* (emphasis in original).[7]

[7] Deference to the Commission is particularly warranted in this case since much of the dually qualified natural gas qualifies as Sec-

Against this backdrop, the Commission's interpretation of the NGPA should be affirmed and the Tenth Circuit reversed. While perhaps not the only possible interpretation, the Commission's interpretation was nonetheless a reasonable one.

A. *The Commission Correctly Concluded That NGPA Section 121 Mandated Deregulation Of Natural Gas Dually Qualified In Both Regulated And Deregulated Categories*

In interpreting a statute, the "point of departure . . . is the language of the enactment," *Andrus* v. *Allard*, 444 U.S. 51, 56 (1979), with that language interpreted in its " 'ordinary, everyday sense[]'," *Malat* v. *Riddell*, 383 U.S. 569, 571 (1966), *quoting Crane* v. *Comm. of Internal Revenue*, 331 U.S. 1, 6 (1947). If, after analysis of the statute, the Court finds " 'the terms of a statute unambiguous, judicial inquiry is complete' " "unless exceptional circumstances dictate otherwise." *Burlington Northern R. Co.* v. *Oklahoma Tax Comm.*, 107 S.Ct. 1855, 1860 (1987), *quoting Rubin* v. *United States*, 449 U.S. 424, 430 (1981). Consistent with these precepts, the Commission analyzed the plain language of NGPA Section 121, interpreted in its ordinary, everyday meaning, and concluded that the unambiguous language of Section 121 mandated deregulation of natural gas dually qualified in both regulated and deregulated categories.

1. An analysis of the language of Section 121 shows the reasonableness of the Commission's interpretation. In particular, Section 121(a) provides in pertinent part that:

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tion 107(c)(5) gas. The Commission has very broad discretion over the price to be charged for that gas. *See Pennzoil Co.* v. *FERC*, 671 F.2d 119, 126 (5th Cir. 1982) ("[t]he authority delegated by Congress [with regard to NGPA Section 107(c)(5)] was broad indeed: responsibility for both the identification of gas to which such incentives should be extended and the determination of the appropriate maximum lawful incentive price . . . .").

> Subject to the reimposition of price controls as provided in section 122 of this title, *the provisions of part A of this subchapter respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall*, except as provided in subsections (d) and (e) of this section, *cease to apply effective January 1, 1985:*
>
> (1) *New natural gas.*—New natural gas (as defined in section 102(c) of this title.)
>
> (2) *New, onshore productions wells.*—Natura gas produced from any new, onshore production well (as defined in section 103(c) of this title), if such natural gas—
>
> (A) was not committed or dedicated to interstate commerce on April 20, 1977; and
>
> (B) is produced from a completion location which is located at a depth of more than 5,000 feet.
>
> * * * * *

(emphasis added). The "provisions of part A" refers to the ceiling prices set forth in Title I of the NGPA. The two noted exceptions refer to Alaska Natural Gas and indefinite price escalators. There is no provision exempting dually qualified gas to any extent whatsoever.

NGPA Section 121, thus, deregulates Section 102(c) and 103(c) natural gas, subject to very limited exceptions that have no pertinence to this case. This is significant because all of the natural gas at issue here qualified for pricing treatment under either Section 102(c) or 103(c). While this gas has also qualified for pricing under other regulated categories, since Congress did not create an exception to Section 121 for dually qualified gas, the dual qualification of that gas has no significance. Under Section 121, that gas is still deregulated.

Therefore, as the Commission found (App. at 75a-76a), the plain language of NGPA Section 121 provided

for the deregulation of the dually qualified gas at issue in this case. At the very least, an analysis of the language of Section 121 shows that the Commission had a reasonable basis for concluding that Section 121 mandated deregulation of this gas.

2. Indeed, any finding to the contrary would by implication add an additional exception to Section 121 for dually qualified gas. Because Section 121 already explicitly delineates two exceptions to the general deregulation mandate, "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *See Andrus* v. *Glover Construction Co.*, 446 U.S. 608, 616-17 (1980); *accord American Bank and Trust Co.* v. *Dallas County*, 463 U.S. 855, 864 (1983); *Andrus* v. *Allard*, 444 U.S. at 56.

3. Further, as also noted by the Commission (App. at 108a-109a), the underlying legislative history of the NGPA supports this interpretation of Section 121. Senator Bartlett, in a discussion of the conference report, stated:

> [I]n informal discussions on the floor it has been asserted that stripper [8] wells are deregulated. *This is true only to the extent that such wells are otherwise new wells and would be deregulated anyway.* Their character as stripper wells, as shown under Section 121, does not get them deregulated in any way.

Cong. Rec. S. 15997 (September 25, 1978), 124 Cong. Rec. 31387 (1987) (emphasis added).[9]

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[8] NGPA Section 108, 15 U.S.C. § 3318.

[9] The Tenth Circuit (App. at 22a) discounted this statement based on a statement in the Conference Report discussing NGPA Section 105 (15 U.S.C. 3315) that stripper gas would remain subject to Section 108 pricing rather than being deregulated "as an existing intrastate contract" under Section 105. That conference report statement has no pertinence to the instant case because it pertained to intrastate gas under Section 105 sold under a contract containing an indefinite price escalation provision, rather than the deregulated categories at issue here which involve Section 102(c) and 103(c) gas. Indeed, in contrast to Sections 121(a)-(c), Section 121(d) maintains maximum lawful prices for intrastate gas sold under a contract containing an indefinite price escalation provision. Thus, the statement in the Conference Report is consistent with the statutory language.

Senator Bartlett's statement indicates that Congress intended for natural gas qualifying in both regulated and deregulated categories to be deregulated. Indeed, such a statement is not surprising given other Congressional indications that the NGPA was intended to result in market-based pricing for high-cost gas, a desire which can only be satisfied if Order No. 406 is affirmed.[10] *See e.g., Transcontinental Gas Pipeline Co.* v. *State Oil and Gas Board*, 106 S.Ct. 709, 716-17 (1986) (in the NGPA, Congress determined "that the supply, the demand, and the price of high-cost gas [should] be determined by market forces").

Therefore, the Commission's conclusion that NGPA Section 121 mandated deregulation of dually qualified gas was a reasonable one. That conclusion which was derived from the statutory language and which is consistent with Congressional intent, is to be regarded as conclusive. *See American Bank and Trust Co.* v. *Dallas County*, 463 U.S. at 862, *quoting Consumer Product Safety Comm.* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

B. *The Tenth Circuit Improperly Relied On An Erroneous Interpretation Of Section 101(b)(5) In Reversing The Commission*

The primary basis for the Tenth Circuit's reversal was its conclusion that NGPA Section 101(b)(5) allowed

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[10] The regulated categories, *e.g.*, §§ 107(c)(5) and 108, associated with this dually qualified gas are high-cost categories with ceiling prices some two-three times above current market clearing prices.

producers of dually qualified gas to choose whether their gas would be regulated or deregulated. The Tenth Circuit's conclusion is legally flawed and cannot be sustained, since the Commission's interpretation of Section 101(b)(5) was clearly reasonable.

1. Section 101(b)(5) provides in pertinent part that:

> If any natural gas qualifies under more than one provision of this subchapter . . . ., the *provision which could result in the highest price shall be applicable.* (emphasis added)

The Commission focused on the plain language of this section and found that this provision was consistent with and supported the deregulation of dually qualified natural gas pursuant to Section 121. App. at 110a-111a.

The Commission's conclusion was certainly a reasonable one since the Commission focused on the language of the statute and interpreted that language based on its "ordinary, everyday" meaning. *See* p. 6, *supra*. In evaluating this statutory provision, the Commission focused on the word "could" and found that "[w]ithout question, a deregulated price *could* always result in a price higher than a regulated price which is subject to a ceiling price." App. at 111a (emphasis in original). There can be no doubt that this reading of Section 101(b)(5) is consistent with the plain words of that provision and, indeed, the Tenth Circuit has conceded this fact (App. at 15a). Thus, the Commission had a reasonable basis in concluding that Section 101(b)(5) supported deregulating natural gas which dually qualified in both regulated and deregulated categories.

2. Further, because the Tenth Circuit's interpretation of Section 101(b)(5) leads to some anomalous results, anomalies that are not present under the Commission's interpretation, the court's interpretation cannot be accepted. For example, the Tenth Circuit's interpretation establishes a price floor. App. at 23a. As this Court has

recognized, however, the NGPA established *ceiling* prices. *See Public Service Commission of New York* v. *Mid-Louisiana Gas Co.*, 463 U.S. at 339. Nowhere in the NGPA, in fact, is there any mention of price floors. Similarly, the Tenth Circuit recognized that its interpretation of the statute would render renegotiation provisions in a large number of contracts meaningless. App. at 17a.

Lastly, the Tenth Circuit's decision would allow producers to choose to deregulate natural gas for a finite period of time and then to subsequently obtain regulation of the same gas. The NGPA expressly provided, however, for gas to be forever deregulated once it was deregulated except under certain very limited circumstances which are not present here. *See e.g.* NGPA Section 121(a). Indeed, the only NGPA provision which allows for price controls to be reimposed is Section 122 (15 U.S.C. § 3332). Such reimposition, however, can only occur by action of the President or Congress. Thus, the Tenth Circuit's interpretation greatly expands Section 122 by allowing natural gas producers, in addition to the President or Congress, to reinstitute price controls. Clearly, such an interpretation should not be allowed to stand.

II. IF THE COURT WERE TO AFFIRM THE TENTH CIRCUIT, THEN ORDER NO. 406 SHOULD BE REVERSED ON A PROSPECTIVE-ONLY BASIS

As detailed above, WNG strongly believes that the Tenth Circuit's interpretation of the NGPA was in error. If the Court, however, affirms the Tenth Circuit's interpretation, then the reversal of the Commission's Order No. 406 should be made effective on a prospective-only basis.[11] This is necessary to prevent gross inequity to natural gas pipelines and their customers.

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[11] By prospectively, we mean prospective from the date of any opinion of this Court.

In determining whether to apply a decision retroactively or prospectively, this Court considers three separate factors:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.' Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.'

Chevron Oil Co. v. *Huson*, 404 U.S. 97, 106-107 (1971), omissions in original citations; *see also Northern Pipeline Const.* v. *Marathon Pipeline Co.*, 458 U.S. 50, 87-88 (1982) (effect of decision was to have a prospective-only application even though Court found statute unconstitutional).

In the instant case, the first *Chevron Oil* factor warrants nonretroactivity because this case involves an issue of first impression. Reversal of Order No. 406 also could not have been reasonably foreshadowed because the Commission's interpretation of the NGPA is supported by the plain language of the statute, as noted above. Given the substantial deference accorded such a Commission interpretation, parties had a reasonable basis in relying on Order No. 406. Indeed, reliance on Order No. 406 was particularly warranted because a number of natural gas producers, including at least one seeking reversal of Order No. 406 in this case, had previously interpreted

the NGPA in a manner consistent with Order No. 406. App. at 112a-113a.

The second and third *Chevron Oil* factors similarly justify nonretroactive treatment. Natural Gas producers, after all, have been collecting the lower deregulated price since January 1, 1985. Presumably producers have made investment decisions based on that lower price, since, as discussed above, many producers at one time believed that the Commission's interpretation was the correct one. Because investments in past periods have already been made and cannot be retroactively changed, a court order making the higher price effective retroactive would thus likely have no effect on investments by natural gas producers and would merely provide producers with a windfall.

In contrast, retroactive application of a decision affirming the Tenth Circuit would result in very substantial harm to natural gas pipelines and their customers. Natural gas pipelines would need to collect hundreds of millions of dollars for past gas purchases from their customers, that in turn, would collect these amounts from the ultimate consumer. These customers would be harmed not only by the collection of such large amounts for past purchases, but substantial intergenerational equity problems would exist in that many of the ultimate consumers would evade their fair share of the costs, with those costs borne, at least in part, by other consumers. *Cf. FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 154-55 (1962) ("the transient nature of our society . . . often prevents refunds from reaching those to whom they are due").

It should be noted that recovery of these amounts by pipelines may, in fact, be difficult because of the current intense competition with alternate fuels, such as fuel oil and spot gas, being experienced by many natural gas pipelines. In these highly competitive times, minor in-

creases in gas costs can have a substantial detrimental effect on a pipeline's ability to sell gas. The very large increases which may be faced by some pipelines will surely have a disastrous effect on those companies' sales and may prevent such companies from recovering all of the retroactive amounts due natural gas producers if the Tenth Circuit is affirmed. Such a result would be contrary to long established principles of public utility ratemaking. *See State of Missouri ex rel. Southwestern Bell Telephone Co.* v. *Public Service Commission of Missouri*, 262 U.S. 276, 291 (1923) (Brandeis concurring) (the Constitution guarantees public utilities "the reasonable cost of conducting the business"); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business").

Further, many of the dollars at issue here involve tight formation natural gas [12] qualifying for an incentive price under NGPA Section 107(c)(5), as well as under a deregulated category. As noted on page 5 n.7, *supra*, special deference is owed the Commission with regard to such 107(c)(5) gas because Congress expressly delegated to the Commission the regulation of this high cost gas. *See* NGPA Section 107(b), 15 U.S.C. § 3317(b). While the Commission was given broad authority to regulate such high-cost gas, Congress only allowed the Commission to provide for an incentive price for 107(c)(5) gas to the extent "necessary to provide reasonable incentives for the production of such high cost natural gas." *Id.*

In discharging its duties with regard to this high cost gas, the Commission found that the incentive price was only "necessary" on an interim basis through January 1,

[12] The ceiling price for Section 107(c)(5) gas is currently in excess of $6.40 per MMBtu, or over three times the market clearing price.

1985.[13] And, as a means of eliminating the interim Section 107(c)(5) price for the post-January 1, 1985 period for much of the gas qualifying under that section, the Commission issued Order No. 406.

Thus, if Order No. 406 were ultimately reversed and applied retroactively, the Commission's efforts in carrying out its statutory responsibilities under Section 107 would be severely disrupted. Natural gas producers, after all, would be allowed to collect this extremely high interim price for some three years after the prices were to have been eliminated and during a time period when such prices were unnecessary. Prospective-only application of any affirmance of the Tenth Circuit's decision would avoid this inequitable and unlawful result.

[13] There is no doubt the Commission intended the tight formation price to be an interim price until deregulation as shown by the following discussion from the rulemaking which promulgated the tight formation incentive price:

> [T]he focus of our pricing inquiry is to determine the necessary incentive for the transition period between now and 1985. It is our intention to establish a price that will stimulate production of gas from tight formations during the transition period.

Order No. 99, FERC Stats. & Regs. [Reg. Preambles] Para. 30,183, p. 31,266 (1980).

CONCLUSION

For the foregoing reasons, the Federal Energy Regulatory Commission's Order No. 406 should be affirmed and the Tenth Circuit's action on Order No. 406 reversed. If the Court, however, were to affirm the Tenth Circuit, then the resulting reversal of Order No. 406 should occur on a prospective-only basis.

Respectfully submitted,

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Nos. 87-363 and 87-364

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Petitioners,

v.

MARTIN EXPLORATION MANAGEMENT COMPANY, *et al.*,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit

MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Interstate Natural Gas Association of America ("INGAA")[1] hereby moves for leave to file the accompanying brief *amicus curiae* in the captioned matter. This motion is being filed in accordance with this Court's Rule 36.

INGAA, as an organization representing virtually all of the major interstate natural gas transmission companies, has a strong interest in this proceeding and has been actively involved in this case since the Tenth Circuit's decision. In that decision and Judgment, the Tenth Circuit reversed the Federal Energy Regulatory

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[1] The member companies of INGAA are listed in the attached appendix to this brief.

Commission's (Commission) interpretation of Section 121 of the Natural Gas Policy Act of 1978 (NGPA) and imposed its own interpretation in lieu of the Commission's, causing substantial adverse impact upon interstate pipelines and the natural gas consumers which they serve.

Because of the substantial adverse impact of the Tenth Circuit's decision, INGAA filed a motion on September 21, 1987 for leave to file a brief *amicus curiae* in support of the petition for a writ of *certiorari* which had been filed by the Commission. These motions became necessary because six of the parties to this case had not consented to INGAA's participation in these proceedings; all of the remaining parties had consented in INGAA's *full* participation.[2] By an unpublished order entered November 30, 1987, INGAA's motion to file its brief *amicus curiae* in support of the petition for a writ of *certiorari* was granted.

In its earlier motion, INGAA set forth fully the facts showing the industry-wide importance of this case and the nature of INGAA's interest in it. INGAA will not repeat all of that discussion here, but respectfully refers the Court to that prior motion. However, it is especially important to emphasize two factors demonstrating that this motion should also be granted: (i) INGAA's interest, as a representative of virtually all major interstate pipelines, is obviously not identical to the regulators' interest of the Commission or the Public Service Commission of the State of New York (Petitioner in No. 87-364) even though INGAA supports the Commission's interpretation of the NGPA before this Court; and (ii) it was not until the Tenth Circuit imposed its own interpretation of NGPA Section 121 upon the Commission and the Commission and the natural-gas pipeline industry that INGAA's interests were adversely impacted.

[2] Copies of the letters evidencing that consent have previously been lodged with the Clerk of the Court. INGAA has not made any further attempts to obtain the consent of the six parties who have previously refused since any such effort would obviously be futile.

The industry-wide importance of this case and INGAA's strong interest in its outcome have not abated since the Court granted INGAA's motion. Indeed, if anything, that interest has grown stronger because the higher gas costs which will result from the Tenth Circuit's erroneous decision continue to accrue. The same factors which justified granting INGAA's motion for leave to file its prior brief *amicus curiae* also warrant the Court granting the instant motion for leave to file the attached brief *amicus curiae* on the merits.

The Commission order under review herein is a generic rulemaking order which, if modified as ordered by the Tenth Circuit, will have a widespread impact on many of the pipeline industry participants. Due to its broad membership base, INGAA will be able to offer the Court a perspective on this case which may be broader than the narrow parochial interests of the individual private parties.

WHEREFORE, for the reasons stated above, and for the reasons stated in INGAA's motion for leave to file its brief *amicus curiae* in support of the petition for a writ of *certiorari*, INGAA respectfully prays that this Court receive the attached brief *amicus curiae* for filing.

Respectfully submitted,

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BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Interstate Natural Gas Association of America ("INGAA"), in accordance with this Court's Rule 36, has received the written consent of several of the parties to participate fully in this case as *Amicus Curiae*. Copies of these consent letters have been filed with the Clerk.[1]

[1] Even though this case is of industry-wide importance, certain gas producer-respondents declined to give their consent to INGAA's participation when INGAA sought to file a brief *amicus* in support of the Commission's petition for writ of *certiorari* to the Tenth Circuit. That INGAA brief *amicus* was subsequently accepted for filing by this Court (see "Motion of Interstate Natural Gas Association of America for Leave to File Brief as *Amicus Curiae* in Support of Petitioners", attached, *supra*).

This brief is in support of the Petitioners, the Federal Energy Regulatory Commission ("Commission") (No. 87-363), Public Service Commission of the State of New York, Panhandle Eastern Pipeline Company, Tennessee Gas Pipeline Company, and Associated Gas Distributors (No. 87-364). For the reasons appearing below, INGAA prays that the Judgment of the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") in *Martin Exploration Management Company, et al. v. Federal Energy Regulatory Commission*, 813 F.2d 1059 (Nos. 84-2756, *et al.*, 10th Cir., decided March 9, 1987, as modified on May 1, 1987), be reversed. App. 1a.[2]

INTEREST OF THE AMICUS CURIAE

INGAA is a nonprofit national association whose members represent virtually all of the major interstate natural gas transmission companies operating in the United States. INGAA's members (listed in the appendix attached to this brief) account for over 90% of all natural gas transported and sold for resale in interstate commerce, and they are subject to the jurisdiction of the Commission under various provisions of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717, *et seq.*; the Department of Energy Organization Act, 42 U.S.C. §§ 7101, *et seq.*; and the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301, *et seq.* The decision of the Tenth Circuit is not consistent with the clear intent and meaning of the NGPA as interpreted by this Court and, unless reversed, will result in substantial prejudice to interstate pipelines and ultimate consumers of natural gas.

STATEMENT OF THE CASE

This case involves Commission rules relating to dual-category gas, *i.e.*, gas which is qualified under an NGPA pricing category and is also qualified for deregulation

[2] "App." refers to the Appendix to the Commission's petition for a writ of *certiorari* filed in No. 87-363 on August 31, 1987.

under NGPA Section 121. The Commission's orders implement NGPA Section 121 which states that "the provisions of subtitle A respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall . . . cease to apply effective January 1, 1985." The Commission, applying Section 121, held that the provisions in that section expressly deregulating one of the two categories must result in the treatment of the subject gas as deregulated under the statute.[3]

The Commission rejected arguments that its interpretation of Section 121 conflicts with NGPA Section 101 (b)(5).[4] The Commission concluded that Section 101(b) (5), which states that for dually-qualified gas "the provision [of Title I—Wellhead Pricing] which could result in the highest price shall apply," does not override the express deregulation mandate of Section 121. The Commission read Section 101(b)(5) as referring to the price resulting from deregulation and not to the price effective under the regulated pricing category in which dual-qualified gas has been qualified. The Commission reached this conclusion based upon the finding that the deregulated price "could result in the highest price" because that price is subject to no legal limitation and the parties "could" always negotiate a price higher than the regulated ceiling price.

In summary, the Commission concluded that NGPA Sections 121 and 101(b)(5) are to be applied independently of private contracts, on the ground that "whether

[3] "Deregulation appears to be mandatory. Producers cannot opt out of the statutory scheme on January 1, 1985, merely because market conditions are unfavorable." App. 76a.

[4] "(5) SALES QUALIFYING UNDER MORE THAN ONE PROVISION. —If any natural gas qualifies under more than one provision of this title providing for any maximum lawful price or for any exemption from such a price with respect to any first sale of such natural gas, the provision which could result in the highest price shall be applicable." 15 U.S.C. 3311(b)(5).

the *contract* allows the producer to collect a price higher than a regulated price is a contractual issue, not an issue raised by the deregulation scheme of the NGPA." App. 111a (footnote omitted). In the Commission's view, private contracts should not control whether first-sale gas is regulated or deregulated; rather, the statute should control.

Reversing the Commission's construction of the statute, the Tenth Circuit agreed that the Commission's interpretation of NGPA Section 121 would be reasonable, standing alone:

> "We conclude that § 121 is ambiguous. Therefore, in the absence of another provision in the statute, FERC's determination that dual category gas is to be considered deregulated would be a reasonable interpretation of the ambiguous language of § 121." 813 F.2d at 1066; App. 11a.

However, the Court went on to hold that the Section 101(b)(5) phrase "could result in the highest price" *must* be read as referring to the highest price resulting from *actual market conditions at each particular moment*. 813 F.2d at 1068; App. 16a. This finding, which is the linchpin of the Tenth Circuit's rationale, fails to accept and give weight to the meaning which the Commission explicitly ascribed to the phrase, *i.e.*, that, in the case of dually-qualified gas, the "highest price" to which Section 101(b)(5) refers is the legally unrestricted, deregulated price.

SUMMARY OF ARGUMENT

1. The Tenth Circuit's interpretation is inconsistent with the purpose and history of the NGPA. The NGPA redefined and replaced the NGA cost-based standard with higher "just and reasonable" price ceilings for "first-sale" gas and, thereafter, with phased-in deregulation through elimination of the statutory ceilings. Those ceilings, and the subsequent deregulation provisions of

NGPA Section 121, were included in light of the ultimate statutory goal of using market forces to *balance* the supply and demand for natural gas. *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi*, 106 S. Ct. 709, 716 (1986) ("*Transco*"). The Commission's interpretation of NGPA Section 121 to deregulate dual-qualified gas is consistent with this overriding statutory objective. The Tenth Circuit's forced interpretation of the NGPA plainly is not.

To achieve the *desideratum* of a gas supply and demand balance, Congress in NGPA Section 121 made most of these NGPA price ceilings temporary.[5] In the short run, they would serve as incentives to the extent that they permitted prices to rise above cost-based levels of the NGA; but they would also serve as limits upon the operation of free market forces to the extent that those forces continued to warrant higher prices. In the longer run, the ceilings were to be phased out, to be replaced by market forces altogether—the ultimate goal.

The Tenth Circuit's interpretation turns the congressional intent on its head because it makes price *floors* of the congressionally prescribed price *ceilings* and extends regulation in the face of a clear congressional intent to deregulate.

2. The Tenth Circuit imposed its own interpretation of the statute upon the Commission and the natural gas industry while conceding that its interpretation pro-

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[5] As this Court explained previously in its *Mid-La II* opinion:

> "For some categories of gas, the NGPA ceiling prices are an intermediate step on the path from a fully regulated industry to a deregulated industry. Sections 121 and 122 of the NGPA provide a mechanism for the ultimate decontrol of a number of categories of natural gas."

Public Service Commission of the State of New York v. Mid-Louisiana Gas Co., 463 U.S. 319, 336 n.14 (1983).

duces "an anomaly in the operation of the NGPA in certain circumstances * * *." 813 F.2d at 1069 n. 11; App. 17a. Indeed, the Tenth Circuit *twice* conceded that its interpretation produces such anomalies. 813 F.2d at 1071; App. 23a.

The Tenth Circuit's decision constitutes an unwarranted intrusion into the administrative process. This is evident in light of the anomalous impacts of the Court's interpretation and the fact that the Commission, not the Tenth Circuit, is the agency charged by Congress with the administration of the NGPA.[6] Further, the Tenth Circuit's admission of such anomalies demonstrates that its order imposing the substitute interpretation does not meet the "reasoned decisionmaking" standard against which courts routinely measure decisions of the Commission.[7] In the circumstances here present, the Tenth Circuit had a duty to defer to the Commission's interpretation of the statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("*Chevron*").

3. The Tenth Circuit's decision is also inconsistent with the plain meaning of the statute. Violating well-established principles of statutory construction, the Tenth Circuit's interpretation of the NGPA assumes that when Congress used the phrase "could result in the highest price" it used the word "could" as synonymous with "would" or "will" as if the phrase reads "*will* result in the highest price." There is no support for such an interpretation of the statute.

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[6] As a hypothetical proposition, it seems compelling (all things being equal) that Congress should be called upon to correct an *agency's* misinterpretation rather than a *reviewing court's* misinterpretation, given the jurisdictional fact that Congress charged the agency with the duty to construe and execute the statute's provisions.

[7] *E.g.*, Greater Boston Television Corp. v. Federal Communications Commission, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

The Tenth Circuit's conversion of "could" to "will" is inconsistent with other portions of the statute and does violence to the plain meaning of the statutory language. It also produces a result which is wholly at odds with Congress' objective to achieve *deregulation* of wellhead prices as reflected in NGPA Section 121.

4. The Tenth Circuit's decision should be reversed under this Court's decision in *Chevron, supra*, requiring judicial deference. Under *Chevron*, the Tenth Circuit was not free to adopt its own interpretation in place of the one chosen by the Commission. The Commission's findings reflect a reasonable reconciliation of NGPA Section 121 and Section 101(b)(5) with each other and with the basic statutory objective to balance gas supply and demand.

ARGUMENT

I. The Tenth Circuit's Interpretation Is Inconsistent with the Purpose and Legislative History of the NGPA.

The Commission, interpreting and applying NGPA Section 121, held that gas which is qualified in an NGPA category that has been deregulated and removed from Commission jurisdiction must be treated as such, even though the gas also has been qualified in an NGPA category which has not been price decontrolled. The reasonableness of the Commission's interpretation is clear against the backdrop of the NGPA, the provisions of the statute, and the ultimate goal of Congress to achieve a supply and demand balance of natural gas.

Prior to the NGPA, the Federal Power Commission (predecessor to the Commission) had been constrained under the NGA's standard to limit such prices to *cost-based* "just and reasonable" levels, even though those price levels tended to be below the prices dictated by the

market.[8] The Commission's inability to provide adequate wellhead price incentives above the cost-based NGA standard frustrated producer efforts to explore for and develop incremental gas supplies for interstate pipelines. Gas supplies were therefore naturally attracted to the unregulated intrastate markets and, during the 1970's, a severe gas shortage in the interstate market ensued.[9]

In response to this national crisis, Congress redefined and replaced the NGA cost-based standard with higher "just and reasonable" NGPA price ceilings for "first-sale" gas. Further, Congress provided for phased-in deregulation of those ceilings. Both the ceilings and the subsequent provisions for deregulation reflected Congress' ultimate goal, noted by this Court in *Transco, supra*, of using market forces to *balance* the supply and demand for natural gas:

> "[T]he NGPA reflects a congressional belief that a new system of natural gas pricing was needed to balance supply and demand.
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> * * * *
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> "* * * [Congress determined] that supply, demand, and the price of high-cost gas be determined by market forces. To the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because it wanted to leave determination of supply and first-sale price to the market." [10]

The Commission's interpretation of NGPA Section 121 to deregulate dual-qualified gas is consistent with this overriding statutory objective. The Tenth Circuit's forced interpretation of the NGPA plainly is not.

[8] *See generally*, Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378, 391-93 (1959).

[9] *See Mid-La II, supra*, 463 U.S. at 330-31 ("The interstate rates remained substantially below the unregulated prices available for intrastate sales, and the interstate supply remained inadequate.").

[10] *Transco, supra*, 106 S. Ct. at 716-17 (1986).

The Tenth Circuit insists that the Commission:

> "* * * has confused the ultimate purpose of the statute—'to assure adequate supplies of natural gas at fair prices,' *Transcontinental Gas Pipe Line Corp.*, 106 S.Ct. at 716—with one of several means chosen to accomplish that purpose—phased deregulation. * * * Incentive prices for difficult to produce gas are another means by which Congress sought to increase energy supplies. * * * We will not strain the plain meaning of § 101(b)(5) in order to serve a goal of deregulation that is itself only one of several means adopted to achieve the purposes of the NGPA." 813 F.2d at 1070-71; App. 20a-22a (footnote omitted).

However, the Commission was demonstrably not confused as alleged by the Tenth Circuit. As the Commission carefully explained:

> "The Commission recognizes that Congress had two major objectives in mind when it passed the NGPA in 1978. First, in the short term, it maintained a regulatory structure of price controls and, within that structure, provided incentives to encourage exploration and development of new reserves and, second, in the long term, it gradually substituted market forces for regulated prices by phasing in deregulation in 1985 and 1987. * * * The deregulation of certain categories of natural gas as provided in the NGPA is not in conflict with the goal of increasing energy supplies. Indeed, deregulation fosters that goal. Without question, phased deregulation was one of the primary methods utilized by Congress to increase energy supplies." App. at 108a (footnote omitted).

INGAA submits that the real problem is not with the Commission's reasoning but with the Tenth Circuit's failure to recognize the ultimate goal of the NGPA to balance gas supply and demand. This failure is evident from the Tenth Circuit's truncated quotation of this

Court's *Transco* opinion, quoted above. The complete thought of this Court, including the portion omitted by the Tenth Circuit (shown with emphasis) reads as follows:

> "The aim of federal regulation remains to assure adequate supplies of natural gas at fair prices, *but the NGPA reflects a congressional belief that a new system of natural gas pricing was needed to balance supply and demand.*" [11]

The Tenth Circuit's reading of *Transco* effectively reads the important words "adequate [gas supplies]" and "fair [prices]" out of the quote. The clear intent of Congress was to have the adequacy of gas supplies and the fairness of prices ultimately determined by market forces.[12] The Tenth Circuit's holding, in contrast, creates price floors as if the goal of the statute was solely to elicit incremental gas supplies, *i.e.*, regardless of price. Moreover, a price is manifestly not "fair" under this market-oriented statute if that price is *imposed* as a regulated price floor.

Again, the intent of Congress was to *balance supply and demand* by setting maximum lawful prices on one hand and, on the other, phasing out controls on new gas

[11] *Supra*, 106 S. Ct. at 716.

[12] As this Court further noted in its *Transco* decision, Congress determined "that the supply, demand, and the price of high-cost gas [should] be determined by market forces." 106 S.Ct. 716-17.

A petition for *certiorari* recently filed in another case by the Shell Offshore producer group concurs:

> "While the Commission has authority to specify terms and conditions for transportation provided under Section 311, that authority cannot be read to undermine the clearly expressed congressional intent to prevent any regulatory interference with the free market pricing scheme set out in the NGPA. * * *" *Id.*, at 14. Similar statements appear elsewhere in that petition. *See*, Shell Offshore Inc., *et al.*, *Petitioners*, v. Associated Gas Distributors, *et al.*, *Respondents*, No. 87-——, dated December 14, 1987, at pp. 10-12, 15, 17-18.

supplies to allow market forces to determine the price. Yet basic economic principles hold that if prices are forced above market clearing levels, an *excessive* supply rather than an *adequate* supply will result. Certainly there is no reasonable basis for concluding that Congress intended to rectify the acknowledged and obvious market ordering problem of the pre-NGPA era with the opposite version of the same problem.

INGAA submits that Congress had no intent to force natural gas buyers to pay rates higher than those which would be dictated by the market. Had that been Congress' design, it surely would have established minimum, not maximum, prices. The NGPA ceilings are plainly maximum prices, not minimum prices.[13]

The Commission has sought to give full reign to market forces in its interpretation of the statute. In contrast, the Tenth Circuit would turn the NGPA into a price *support* scheme which would protect producers from downside risks and force gas consumers to pay above-market prices for their gas. Nothing in the language or legislative history of the NGPA supports such an interpretation or result.

II. The Tenth Circuit's Decision Produces Anomalous and Absurd Results.

The Tenth Circuit candidly admits that its interpretation of the NGPA produces unexpected and bizarre results. For example, the Court notes that its decision creates an

[13] This fact is made very clear in Section 101(b)(9) which is directed to "maximum lawful price[s] under this title" and provides that, regardless of whether gas is regulated or deregulated, the price charged cannot exceed the contract price, even if that price is well below the allowable ceiling price. 15 U.S.C. § 3311 (b)(9). Thus, the statute expressly permits sellers and buyers of first-sale gas to contract for prices at less than the statutory maximums.

"* * * anomalous situation [where] . . . producers seek the regulated ceiling price rather than the deregulated market price. * * * Therefore, § 101(b)(5) can have the unanticipated effect of operating as a price floor for producers. * * *" *Id.* at 1071; App. 23a.

The Court further concedes that in the case of contracts which require the parties to renegotiate the gas price in the event the gas is deregulated, the Court's ruling will create a "Catch 22" situation such that corrective action by Congress may be required. *Id.* at 1068, n. 11; App. 16a-17a. The "Catch 22" situation stems from the fact that typical contract renegotiation provisions are triggered only in the event of deregulation; yet, under the Tenth Circuit's interpretation the determination of whether the gas is deregulated cannot be made until there is a renegotiated price to be compared against the ceiling price. This admission alone eloquently signals the Tenth Circuit's unwarranted intrusion into the administrative process.

Even where there is no "Catch-22" situation, *e.g.*, the contract has no "typical" renegotiation provision, the Tenth Circuit's interpretation would effectively delegate the determination of which gas should be deregulated to private parties. The Tenth Circuit would empower the contracting parties to determine, through the structuring of their contract, whether the gas will be treated as regulated or deregulated.[14] The Commission, as the agency charged with enforcing the provisions of the NGPA, would be relegated to a role of examining and interpreting those dually-qualified gas contracts to de-

[14] Indeed, as the Court noted, in the case of contracts for dually-qualified gas which provide that the parties will renegotiate the contract price in the event of deregulation, the regulated price would always prevail. 813 F.2d 1069, n.11; App. 17a. By executing such a contract, the parties could totally thwart the operation of Section 121 of the NGPA.

termine what price would apply if the gas in question were deemed to be deregulated.[15] The Commission would then have to compare that deregulated price against the regulated price to determine which is higher, *i.e.*, to determine whether the gas should be treated as regulated or deregulated. The endlessness of the administrative burdens attending the Tenth Circuit's holding is apparent. Indeed, such a determination would have to be made for each contract on a monthly or more frequent basis.[16]

The NGPA, however, is structured with specific objective standards for determining whether gas qualifies as "first-sale" gas and, if so, in what category it falls. Thus, it specifies well spud dates, depth of wells, production rates, *etc.*, as controlling criteria. *See*, NGPA Sections 102 and 108, 15 U.S.C. §§ 3312 and 3318. As Congressman Dingell stated:

"The FERC is intended to play an enforcement role with respect to the ceiling prices, not with respect to enforcement of private contracts *per se*. . . . [I]t is contemplated that FERC's implementation of the bill will be accomplished with minimal interference with contractual relationships." [17]

In contrast to this intended Commission role, the Tenth Circuit would convolute the statutory scheme for deregulation into one requiring an *expansion* of the Commission's regulatory oversight: the Commission must now become bogged down in a spate of proceedings involving the interpretation and enforcement of private contracts.

[15] "The contractual provision that 'could' result in the highest price at a particular moment will establish the applicable category under Section 101(b)(5)." 813 F.2d at 1069, App. 16a-17a.

[16] As the Tenth Circuit ruled, "[s]ection 101(b)(5) therefore requires a comparison of the applicable price for each category *at a particular moment*." 813 F.2d at 1068; App. 16a-17a.

[17] *Natural Gas Policy Act Information Service*, Para. 101:236, p. 3.

This Court has long held that interpretation of a statute often involves some leeway in ascribing meaning to particular words in order to avoid absurd results or a consequence which would thwart the obvious purpose of the statute. *United States v. Turkette*, 452 U.S. 576, 581 (1981), *citing Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965). Certainly, the Commission's interpretation of the NGPA is a reasonable and rational implementation of the intent of Congress and is consistent with the generally accepted meaning of the statutory language.

The anomalies resulting from the statutory interpretation imposed by the Tenth Circuit demonstrate that such substitute interpretation does not meet the "reasoned decisionmaking" standard against which courts routinely measure decisions of the Commission.[18] In the circumstances here present, the Tenth Circuit had a duty to defer to the Commission's interpretation of the statute. *Chevron, supra.*

III. The Tenth Circuit's Decision Is Inconsistent with the Plain Meaning of the Statute.

Another critical flaw in the Tenth Circuit's reasoning lies in its linchpin declaration that the Commission's interpretation of the word "* * * 'could'—one that considers only the theoretical possibilities—renders § 101(b)(5) meaningless." 813 F.2d at 1068; App. 16a. The significance of this finding is that, without it, the Tenth Circuit could not have gone on to adopt and impose its own interpretation of NGPA Section 121 as a substitute for that adopted by the Commission.

Contrary to the holding of the Tenth Circuit, the Commission's reading of the word "could" in Section

[18] *E.g., Greater Boston Television Corp. v. Federal Communications Commission, supra.*

101(b)(5) is consistent with the statute's plain meaning, is clear and unambiguous, is meaningful, and does not render Section 101(b)(5) meaningless. This is evident from the words of the statute as well as the overall objective of the NGPA to achieve deregulation of most first-sale gas within the time schedule established in NGPA Section 121.

It is well established that where the statutory language is clear on its face, it is controlling.[19] The Tenth Circuit, however, neglected this rule and, in contrast to the Commission's consistent and reasoned interpretation of NGPA Sections 121 and 101(b)(5), adopted an arbitrary, forced, and capricious interpretation requiring an actual price comparison at any given moment of time, as if the phrase "could result in the highest price" said "*would* or *will* result in the highest price."

Producer Respondents suggest that "Congress would not have seized upon a subtlety so obscure as the Commission's current interpretation of 'could' had it intended that deregulated treatment must always apply to dual category gas eligible for decontrol."[20] But there is nothing obscure about the difference in meaning between the word "could", as used in NGPA Section 101(b)(5), and the words "will" or "would" which were not used in that section.

The Producer Respondents correctly note that the NGPA was a "closely negotiated . . . compromise [in-

[19] *E.g.* Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.")

[20] "Brief in Opposition to Petitions for a Writ of *Certiorari* to the United States Court of Appeals for the Tenth Circuit" filed herein on October 30, 1987, at 11.

volving] . . . 18 months of legislative battles."[21] Given this lengthy history, there is no reason to believe that the words appearing in the statute were imprecisely chosen or used. Rather, that extended history suggests that the word "could" was used deliberately and that it was intended to convey its usual meaning.[22]

Moreover, an examination of the entire statute reveals that Congress was fully aware of the distinction between the words "could" and "would" or "will." For example, Congress in NGPA Section 102(c)(1)(C)(ii) provided for an exclusion from the definition of new onshore reserves, excluding a reservoir penetrated by an old well where "natural gas *could* have been produced in commercial quantities from such reservoir through such old well before April 20, 1977." 15 U.S.C. § 3312(c)(1)(C)(ii) (emphasis added). Clearly, the meaning of the word "could" in that provision of the NGPA is consistent with the Commission's interpretation of that word in Section 101(b)(5).[23] That is, it refers to a possibility, not a certainty or fact.

It is a well established rule of statutory construction that where a word is used in more than one place in a statute it should be construed to have the same meaning in each instance.[24] Application of that rule to this case

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[21] *Id.* at 11-12.

[22] Unless otherwise indicated, words should be given "their ordinary, contemporary, and common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979) (citations omitted).

[23] Indeed, any other reading of that provision would render it meaningless.

[24] *E.g.* Barnson v. United States, 816 F.2d 549, 554-55 (10th Cir. 1987); Firestone v. Howerton, 671 F.2d 317, 320 n.6 (9th Cir. 1982); United States v. Nunez, 573 F.2d 769, 771 (2nd Cir.), *cert. denied*, 436 U.S. 930 (1978). But see United States v. Stauffer Chemical Co., 684 F.2d 1174, 1184-85 (6th Cir. 1982), *aff'd*, 464 U.S. 165 (1984), where the Sixth Circuit held that a term in a

leads to the conclusion that Congress did not use the word "could" as synonymous with "would" or "will."

This conclusion is reinforced by the fact that when Congress intended to refer to more than "possible" results, it used the word "will" or "would." For example, in Section 311(b)(7) of the NGPA, 15 U.S.C. § 3371, Congress provided that if the Commission's grant of sales authority under that section "would" produce specified impacts the Commission would be required to disapprove the application. In each instance, Congress used the word "would" as describing an actual impact resulting from a grant of such authority, and not simply one of several possible results as would have been the case if the word "could" had been used instead of "would".[25] Similarly, Congress used the word "will" in Section 504(b)(1), 15 U.S.C. § 3414(b)(1), to connote a definite result rather than a possible one.

In each instance noted above where Congress used the term "would" or "will" in the NGPA, substitution of the word "could" would have significantly altered the meaning of the particular statutory provision. This demonstrates beyond reasonable argument that Congress did not use those words synonymously in the NGPA.

As this Court has said, "[n]ormal principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ . . . ." *Offshore Logistics, Inc. v. Tellentire*, 106 S.Ct. 2485, 2495 (1986). Congress clearly understood the difference in the meaning between the term "could" on the one hand and

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statute could have different meanings where a contrary holding would produce an absurd result. The Supreme Court affirmed on collateral estoppel grounds, and did not reach the merits of the case.

[25] Other instances where the term "would" is used in the same manner are found in Section 315(b)(2) and (3), 15 U.S.C. § 3375(b)(2) and (3), and Section 503(c)(2), 15 U.S.C. § 3413(c)(2).

"would" or "will" on the other, and used each accordingly in the NGPA.

Moreover, there is no "compelling evidence" that Congress intended NGPA Section 101(b)(5) to be read in a manner that would thwart the deregulation goal explicitly mandated in NGPA Section 121. Yet, the import of the Tenth Circuit is to do just that.

Further, the reading of Section 101(b)(5) imposed by the Tenth Circuit frustrates the explicit statutory command of NGPA Section 121 that, on the dates specified, the Commission must deregulate gas which is qualified for deregulation under that section. It is ludicrous to interpret clear congressional intent to deregulate natural gas and to let the competitive forces of the market set prices as an intent to provide producers a security blanket of price supports if the market does not provide them with a price high enough to meet their satisfaction.

IV. The Tenth Circuit's Decision Should Be Reversed under This Court's Decision in *Chevron* Requiring Judicial Deference.

The Commission's interpretation of NGPA Section 121 and Section 101(b)(5) is entitled to judicial deference. In *Chevron, supra*, this Court explained that a court is not free to adopt its own interpretation in place of the one chosen by the agency. Rather, if the agency's

> "* * * choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [a court] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' *United States v. Shimmer*, 367 U.S. 374, 383 * * * (1961).[26]

This Court has also held that the deference to be accorded to an agency's interpretation is strongest where,

[26] *Supra*, 467 U.S. at 844.

as here, the agency is carrying out its congressionally-imposed mandate.[27]

INGAA submits that the Commission's construction of NGPA Sections 121 and 101(b)(5) to deregulate gas which has been dually qualified should have been affirmed by the Tenth Circuit. The Commission's findings reflect a reasonable reconciliation of those statutory provisions with each other and with the basic statutory objective to balance gas supply and demand. As such, those findings should have been accepted by the Tenth Circuit under this Court's directive in *Chevron*.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Tenth Circuit below and affirm the interpretation of the NGPA which the Commission had found proper.

Respectfully submitted,

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[27] "* * * We have elsewhere held that we may not, 'in the absence of compelling evidence that such was Congress' intent . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.'" Permian Basin Area Rate Cases, 390 U.S. 747, 780." United States v. Southwestern Cable Co., 392 U.S. 157, 177-78 (1968) (additional citations omitted).

APPENDIX

1988
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA ACTIVE MEMBERSHIP

AlaTenn Resources, Inc.
Arkla, Inc.
Blue Dolphin Pipe Line Company
The Coastal Corporation
Columbia Gas Transmission Corp.
Consolidated Natural Gas Company
El Paso Natural Gas Company
Enron Corp.
Granite State Gas Transmission, Inc.
Great Lakes Gas Transmission Company
Kentucky West Virginia Gas Company
KN Energy, Inc.
Michigan Gas Storage Company
MidCon Corp.
Mountain Fuel Resources, Inc.
Pacific Gas Transmission Company
Pacific Interstate Company
Panhandle Eastern Corporation
SONAT, Inc.
Tenneco Gas Pipeline Group
Texas Eastern Gas Pipeline Company
Texas Gas Transmission Corporation
Texas Oil & Gas Corporation
Transco Gas Company
United Gas Pipe Line Company
Valero Interstate Transmission Company
Valley Gas Transmission, Inc.
The Williams Companies

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INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA ASSOCIATE MEMBERS

Amoco Production Company
ARCO Oil and Gas Company
Atlanta Gas Light Company
The Brooklyn Union Gas Company
Chevron USA
Cities Service Oil and Gas Corporation
Conoco Inc.
Entex, Incorporated
Exxon Company, U.S.A.
John H. Hill
HNG Oil Company
Kerr-McGee Corporation
Kinsey Interests, Inc.
Laclede Gas Company
Lear Petroleum Exploration Company
Marathon Oil Company
Mewbourne Oil Company
National Fuel Gas Company
NUI Corporation
Oklahoma Natural Gas Company,
  a Division of ONEOK Inc.
Phillips Petroleum Company
Shell Oil Company
Southern California Gas Company
Sun Exploration & Production Company
Texaco U.S.A.
Union Pacific Resources Company
Unocal Corporation